

# THE RISE OF BALANCED BUDGET LAWS IN CANADA: LEGISLATING FISCAL (IR)RESPONSIBILITY<sup>©</sup>

BY LISA C. PHILIPPS\*

Virtually unknown in Canada before the 1990s, balanced budget legislation has suddenly become popular across the country. The author examines the wide diversity of mechanisms being used to limit state fiscal powers, including spending caps, anti-deficit rules, and tax referenda. Evaluating these measures, the author raises concerns about the impact of balanced budget laws on economic stability, social justice, and political democracy. She warns against discounting either their instrumental effects or their power to shape public finance discourse. Though some provinces have adopted less severe versions, the author concludes that these efforts only partially mitigate the dangers of balanced budget laws.

Virtuellement inconnue au Canada avant les années quatre-vingts, les lois visant l'équilibre budgétaire gagnent en popularité à travers le pays. L'auteure examine la diversité des mécanismes utilisés afin de limiter les pouvoirs fiscaux de l'État, incluant les limites de dépenses, les règles anti-déficits et les référendums fiscaux. En évaluant ces mesures, l'auteure soulève la problématique de l'impact des lois visant l'équilibre budgétaire sur la stabilité économique, la justice sociale, et la démocratie politique. Comme le prévient l'auteure, il ne faut pas sous-estimer les effets contributifs de ces lois ni le pouvoir desdites lois afin d'influencer le discours en matière de finance publique. Bien que quelques provinces aient adopté des versions moins contraignantes, l'auteure conclut que ces efforts n'atténuent que partiellement les dangers découlant des lois visant l'équilibre budgétaire.

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\* Assistant Professor, Osgoode Hall Law School, York University. I thank Paul Belanger, Neil Brooks, Alex Easson, Judy Fudge, Harry Glasbeek, Allan Hutchinson, Marlee Kline, Patty Peppin, David Schneiderman, Kathy Teghtsoonian and anonymous referees for helpful comments and conversations. I am also indebted to Wendy Sutton for her excellent research assistance. Any shortcomings in the paper are my own doing.

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## I. INTRODUCTION

Fiscal restraint and deficit reduction have become virtual mantras for all levels of Canadian government in the 1990s, regardless of geographic or political affiliation. An attitude of skepticism toward government spending, borrowing, and taxing has established itself as the political norm and shows few signs of dissipating even as federal and provincial governments begin to report dramatically lower deficits and, in some cases, budget surpluses.<sup>1</sup> This article examines the sudden mania for balanced budget legislation in Canada as one expression of this new found politics of fiscal austerity. In recent years most of our provincial and territorial legislatures have passed laws to prohibit budgetary deficits, or to limit other fiscal policy making powers

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<sup>1</sup> See K. Treff & D.B. Perry, *1996 Finances of the Nation* (Toronto: Canadian Tax Foundation, 1997) c. 2. The most striking case is in Alberta, where severe expenditure cuts have been followed by an estimated 2.2 billion dollar surplus for the 1996-97 fiscal year: Alberta, Department of Finance, *Budget '97: Building Alberta Together* (Edmonton: Queen's Printer, 22 February 1997). The federal deficit has also declined far more quickly than forecast. Private sector economists are now predicting a surplus by fiscal year 1998-99: see S. McCarthy, "Debt Burden is Next Liberal Target" *The [Toronto] Globe and Mail* (17 June 1997) A1. The government's projections are more cautious: see Canada, Department of Finance, *Budget Plan: including supplementary information and notices of Ways and Means Motions/ tabled in the House of Commons by the Honourable Paul Martin, Minister of Finance* (Ottawa: Department of Finance, 18 February 1997) [hereinafter *Budget 97*] at 10-20.

traditionally exercised by their executive governments. Tax referendum laws, spending caps, debt repayment mandates and other legal mechanisms are springing up in increasing numbers, and may well proliferate further. In Ontario, so far a notable holdout, both Progressive Conservative leader Mike Harris and Liberal leader Lyn McLeod pledged during the 1995 election campaign that they would bring in balanced budget laws of some kind. Others are promoting the idea of federal legislation, or even a constitutional amendment.<sup>2</sup>

Though novel in Canada, fiscal limitation laws have a long history in the United States, particularly at the state government level. Recent proposals for a balanced budget amendment to the United States Constitution have been rejected by only the narrowest of margins and have generated vigorous debate among American politicians and academics.<sup>3</sup> By comparison, the rise of balanced budget legislation in Canada has attracted remarkably little sustained analysis. Proponents claim that legal constraints are needed to counteract a propensity for politicians to tax and spend excessively. Such claims, inspired vaguely by public choice theories of government, have gone largely unchallenged in Canadian academic literature. Critiques of the prevailing fixation on deficit and debt reduction certainly exist, but they have not grappled with the specific implications of the move to legislate balanced budgets. It is tempting to minimize the importance of these new laws, and many assume they are little more than rhetorical bluster that simply reaffirms the already dominant fiscal agenda. This article is a response both to the proponents of balanced budget legislation and to those who would discount it as mere posturing. I argue that whatever one's fiscal politics, there are serious drawbacks to entrenching restraint policies in statutory

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<sup>2</sup> In the 1997 Federal election campaign, the Progressive Conservatives promised to introduce "[b]alanced budget and taxpayer protection legislation that provides for responsible fiscal management by the federal government": *Designing a Blueprint for Canadians: Guiding Principles and Policy Priorities of the Progressive Conservative Party of Canada* (Ottawa: Progressive Conservative Party, undated) at 7. Similarly, the Reform Party said it would "cap federal spending and enact balanced budget legislation": *A Fresh Start for Canadians* (Calgary: Reform Party, October 1996) at 6 [hereinafter *Fresh Start*]. See also H.G. Grubel, "Constitutional Limits on Government Spending Deficits and Levels in Canada" in H.G. Grubel, D.D. Purvis & W.M. Scarth, eds., *Limits to Government: Controlling Deficits and Debt in Canada* (Toronto: C.D. Howe Institute, 1992) 1 [hereinafter *Limits to Government*].

<sup>3</sup> On 4 March 1997 the United States Senate voted 66-34 in favour of the amendment, one short of the required two-thirds majority: G. Fraser, "Republicans Suffer Stinging Setback" *The [Toronto] Globe and Mail* (5 March 1997) A11. See also "Pro & Con: Should the Senate Pass a Balanced Budget Amendment to the U.S. Constitution?" (1997) 76 Cong. Dig. 74. A similar proposal was defeated in 1995, also by a single Senate vote: see (1995) 74 Cong. Dig. 161. For an overview of state balanced budget laws see J.M. Poterba, "Balanced Budget Rules and Fiscal Policy: Evidence from the States" (1995) 48 Nat'l Tax J. 329.

or constitutional form. The attempt to legislate current notions of fiscal responsibility, I argue, is most likely to promote policy decisions that are economically, socially, and democratically unsound for Canada.

Part II maps out just what the new statutes provide, emphasizing how they break with traditional budgeting practices, and highlighting the surprising range of approaches adopted across the country. I suggest this interjurisdictional diversity reflects an important degree of continuing dissension about the proper goals of fiscal policy, and more basically about the role of government in social and economic affairs. In Part III, I link the design differences among balanced budget laws to an ongoing contest between neoliberal and welfare liberal images of the state. Despite its anti-state connotation, I argue, this new wave of legislation invites renewed discussion of the mutually constitutive relationship between states and markets in Canadian society.

With this framework in mind, Part IV goes on to discuss three major types of problems or dangers raised by the recent crop of balanced budget laws, especially, but not only, by the more extreme versions in some provinces. I first consider the economic impact of balanced budget laws, and review the concerns flagged by many commentators that overly rigid constraints on borrowing can be inefficient and destabilizing if they inhibit government spending just when it is most needed to offset recessionary trends in the private sector. This literature challenges the simplistic notion that a zero deficit policy is inevitably beneficial to the economy, and reminds us of the close interdependence between public spending and a flourishing private market. The article then turns to problems of social justice. I argue that balanced budget laws are likely to exacerbate social and economic disparities and to heighten barriers to equality-seeking public initiatives. This danger derives both from the instrumental rigours of the legislation and from its more subtle discursive effects. As coercive instruments, fiscal limitation laws will increase the pressure on governments to move further in the direction of regressive tax and expenditure measures, particularly during future recessions. This instrumental capacity derives in part from the coherence of balanced budget legislation with dominant ideological discourses. The legislation is backed by and contributes to a larger discourse of restructuring that promotes a reduced role for government in meeting basic human needs, and constructs class, gender, racial and other forms of inequality as matters of individual, private responsibility. Finally, I consider implications for democratic governance. Fiscal limitation laws are frequently presented as tools to render the public sector more accountable. I argue to the contrary that their overwhelming thrust is to discourage informed debate about where

deficit reduction should rank in the policy agenda, how it should be achieved, and who will bear the cost. The need to democratize economic policymaking is clear; however the democratic promise of balanced budget laws is a false one. By installing deficit and debt elimination as self-evidently more important than any other governmental objective, they promise instead to diminish political dialogue about what goals we want our elected representatives to pursue.

In Part V, I weigh the combined significance of these drawbacks, and conclude that the most extreme forms of balanced budget legislation presently in force in Canada are ill-conceived and should be rejected out of hand. I also caution against uncritical acceptance of the apparently “kinder, gentler” versions enacted in some provinces. Though posing fewer immediate dangers, they too fall into the trap of constructing government as excessively large and interventionist, and as harmful to the common interest. In this sense, all the current laws tend to reinforce the false necessity of sacrificing social spending to debt control, and help to pre-empt discussion of other possible choices. There is a pressing need to interrogate the prevailing notion of fiscal responsibility itself, and to challenge the idea that a conventional balance sheet can adequately capture the role of government in our society or properly measure its success.

## II. A TAXONOMY OF CANADIAN BALANCED BUDGET LEGISLATION

This article uses the terms “balanced budget law” and “fiscal limitation law” interchangeably to refer to a variety of different legal limits on the fiscal policy-making powers of government. A balanced budget in the most conventional sense is achieved when revenues meet or exceed expenditures for a given year, so that government incurs no annual deficit. However the legislation reviewed in this article speaks to many different aspects of fiscal policy besides the narrow issue of annual deficits. As the central vehicle for expressing a government’s fiscal policy, budgets project the level of public expenditure for the coming year as well as the mixture of taxation, borrowing and other revenue measures that will be used to finance those expenditures.<sup>4</sup> Thus, a balanced budget law, broadly defined, might attempt to restrain

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<sup>4</sup> See “fiscal policy” in J. McMenemy, *The Language of Canadian Politics: A Guide to Important Terms and Concepts* rev. ed. (Waterloo, Ont.: Wilfred Laurier University Press, 1995) at 113.

government with respect to any or all of the following: spending levels; the level or mode of taxation; whether or when it can incur deficits; the use of budgetary surpluses; and/or the repayment of public debt. One purpose of this article is to draw attention to the striking contrasts among different forms of balanced budget legislation across the country. A brief legislative history is useful by way of introduction, to be followed later by a more thorough exposition of important details.

The first Canadian balanced budget law was enacted in 1991, when British Columbia's Social Credit government introduced the *Taxpayer Protection Act*<sup>5</sup> only to see it repealed the following year after the New Democratic Party (NDP) came to power in the province.<sup>6</sup> Basically, the statute prohibited the provincial government from raising tax rates, and required that total revenues meet or exceed total expenditures computed over a five year period.

Following the short-lived British Columbia experiment, several other Canadian jurisdictions entered the field. In 1992 the federal and Alberta governments each adopted a *Spending Control Act* that placed limits on program spending. Nova Scotia followed a similar path in 1993 with its *Expenditure Control Act*.<sup>7</sup> Unlike the British Columbia law, these statutes did not call on government to balance expenditures with revenues; they simply capped either spending or spending growth. The federal Act expired at the end of its five year horizon and was not renewed, whereas Alberta's *Spending Control Act* was quickly superseded by more aggressive provincial laws that purport to ban deficit financing in the province altogether.<sup>8</sup> Nova Scotia's Act remains in force, and is the sole surviving example of spending control legislation in the country.<sup>10</sup> Several more jurisdictions have joined the legislative bandwagon since 1993, but all have opted for a full fledged deficit elimination law, rather than just a spending cap.

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<sup>5</sup> S.B.C. 1991, c. 6.

<sup>6</sup> *Taxpayer Protection Repeal Act* S.B.C. 1992, c. 23.

<sup>7</sup> *Spending Control Act* S.C. 1992, c. 19; and *Spending Control Act* S.A. 1992, c. S-21.7.

<sup>8</sup> S.N.S. 1993, c. 4.

<sup>9</sup> *Deficit Elimination Act* S.A. 1993, c. D-6.5, followed by the *Balanced Budget and Debt Retirement Act* S.A. 1995, c. B-0.5 [hereinafter Alberta Act].

<sup>10</sup> See Part II(B)(1), below, for further discussion.

Anti-deficit laws of various forms have now been adopted by the Northwest Territories,<sup>11</sup> Alberta,<sup>12</sup> Saskatchewan,<sup>13</sup> Manitoba,<sup>14</sup> Quebec<sup>15</sup> and New Brunswick.<sup>16</sup> Two of these—Alberta and Manitoba—have also introduced tax referendum laws, and British Columbia has recently enacted a new tax freeze.<sup>17</sup>

Canadian balanced budget laws share a common theme of restraining fiscal choices, but vary widely in the nature and severity of the limits they impose on governments. The main differences are explicated below.<sup>18</sup> Before turning to the legislative details, however, it is important to consider how the advent of balanced budget laws breaks with historical conventions of fiscal policymaking, and why this is an important departure in our governmental system.

#### A. *Altering the Fiscal Firmament: The Decline of Executive Responsibility*

The political triumph of fiscal conservatism has been resounding, and this may help to account for the dearth of critical analysis attending the rise of balanced budget legislation. To many observers, the expression of these fiscal politics in statutory form may seem largely redundant. I argue, to the contrary, that it represents an important shift in the fiscal firmament. The nature of this shift becomes perceptible when balanced budget requirements are juxtaposed against the constitutional, legal and political framework that historically has governed fiscal policymaking in Canada. The new laws attempt to move power and responsibility for fiscal decisions farther away from the elected government of the day, thereby altering a key aspect of the

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<sup>11</sup> *Deficit Elimination Act* S.N.W.T. 1995, c. 22 [hereinafter Northwest Territories Act].

<sup>12</sup> Alberta Act, *supra* note 9.

<sup>13</sup> *Balanced Budget Act* S.S. 1995, c. B-0.01 [hereinafter Saskatchewan Act].

<sup>14</sup> *The Balanced Budget, Debt Repayment and Taxpayer Protection and Consequential Amendments Act* S.M. 1995, c. 7 [hereinafter Manitoba Act].

<sup>15</sup> *An Act Respecting the Elimination of the Deficit and a Balanced Budget* Q. 1996, c. 55 [hereinafter Quebec Act].

<sup>16</sup> *Balanced Budget Act* S.N.B. 1993, c. B-0.1, as am. by S.N.B. 1995, c. 23 [hereinafter New Brunswick Act].

<sup>17</sup> Manitoba's tax referendum requirement is part of the Manitoba Act, *supra* note 14. See also the *Alberta Taxpayer Protection Act* S.A. 1995, c. A-37.8. In British Columbia, see the *Tax and Consumer Rate Freeze Act* S.B.C. 1996, c. 17. See Part II(B)(5), below, for discussion.

<sup>18</sup> See Part II(B), below, for discussion.

relationship among executive, legislative, and judicial branches of government.

Both federally and provincially, Canada has adhered strongly to the principle of executive responsibility for fiscal policy choices. The annual budget is seen as a priority-setting exercise of fundamental importance for the government of the day, and a critical instrument for responding to political and economic conditions as they develop.<sup>19</sup> Thus, the cabinet, particularly the finance minister and the prime minister or premier, plays an especially hands-on role in decisions about expenditure levels and priorities, and about the financing of expenditures through taxation or borrowing. Bargaining takes place among those ministers who tend to act as guardians of the treasury (primarily the finance minister and head of the treasury board), and those who hold spender portfolios.<sup>20</sup> The final budget proposals are crafted in great secrecy by the finance minister and his or her senior advisors, subject to the prime minister or premier's agreement.

Though ultimately subject to legislative approval, fiscal decisions have been regarded as a defining feature of a government's political program, and are closely linked to executive prerogative. Under the federal Constitution, money bills can be initiated only in the House of Commons and cannot be adopted without the recommendation of the Crown.<sup>21</sup> The effect is largely to restrict tax and appropriations measures to government, and to limit severely the ability of private members or senators to introduce or amend such legislation.<sup>22</sup> A government's budget proposals are seldom altered after tabling in the legislature. Speaking to an American audience, federal Finance Minister Paul Martin boasted that "one of the advantages of Canada's parliamentary system ... is that the budget that is announced is also the budget that is enacted (provided the government holds a majority of

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<sup>19</sup> On federal and provincial budgeting processes, see G.B. Doern, A.M. Maslove & M.J. Prince, *Public Budgeting in Canada: Politics, Economics and Management* (Ottawa: Carleton University Press, 1991) [hereinafter *Public Budgeting*] especially c. 2 and 6; and A.M. Maslove, M.J. Prince & G.B. Doern, *Federal and Provincial Budgeting* (Toronto: University of Toronto Press, 1986).

<sup>20</sup> See D.J. Savoie, *The Politics of Public Spending in Canada* (Toronto: University of Toronto Press, 1990).

<sup>21</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 53 and 54.

<sup>22</sup> For a detailed discussion of these limitations and the uncertainty surrounding their precise scope, see J. Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995) 27 *Ottawa L. Rev.* 35.

seats in the House of Commons).”<sup>23</sup> Indeed the defeat of a motion to approve the budget is conventionally regarded as a clear vote of non-confidence in the government of the day.<sup>24</sup> Though recent years have seen governments accede somewhat to pressures for more public pre-budget consultations, the Cabinet still functions as the real “political crucible”<sup>25</sup> with final authority for fiscal decisions.

The very concept of balanced budget legislation strikes directly at this principle of executive responsibility. For the legislature to draw explicit boundaries around the cabinet’s budgetary domain represents a notable shift in the distribution of powers within our system of constitutional government. It means that the elected government’s range of policy choices is circumscribed by prior action of the legislative branch, as well as by the judiciary’s authority to interpret and apply those statutory limits.

One might question the importance of this shift in a parliamentary system where the executive government generally controls the legislative branch in any event. After all, balanced budget laws have not been initiated by opposition or backbench legislators in reaction to cabinet policies, but have been self-imposed by governments eager to display their commitment to fiscal prudence. In fact, American commentators have questioned why Canadians would bother imposing fiscal limitation laws given our highly centralized budgeting processes. Unlike the American case, where the budget is vulnerable to conflicts among Congressional interests, a Canadian majority government, in theory, should be able to control its own fiscal policy as easily as it can enact or repeal a balanced budget law.<sup>26</sup> This point also hints at a certain skepticism about the practical significance of such laws in Canada, since governments could always move for amendment or repeal should the legal limits prove inconvenient. An even more cynical view is

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<sup>23</sup> Paul Martin, Minister of Finance, “Symposium on Budget Deficits and Debt: Issues and Options” (Address to the Fed. Res. Bank of Kansas City, Jackson Hole, Wyo., 1 September 1995) [unpublished].

<sup>24</sup> See N. Ward, *Dawson’s The Government of Canada* 6th ed. (Toronto: University of Toronto Press, 1987) at 145.

<sup>25</sup> *Public Budgeting supra* note 19 at 44. See also G.B. Doern, “Fairness, Budget Secrecy, and Pre-Budget Consultation in Ontario, 1985-1992” in A.M. Maslove, ed., *Taxing and Spending: Issues of Process* (Toronto: University of Toronto Press, 1994) 3.

<sup>26</sup> See Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Respecting: Pursuant to Standing Order 108(2), consideration of the proposed Spending Control Act Including the Sixth Report to the House* 3rd Sess., 34th Parl., 1991 (Chair: M. Dorin) Issue No. 26 (26 November 1991) at 26:7 [hereinafter *Report of the Standing Committee on Finance*].

that the laws will simply be ignored by governments that find reason to spend or borrow beyond the statutory limits. It is important to respond to these points because they are commonly offered as reasons to dismiss the advent of balanced budget legislation as a fashionable but rather trivial trend. In my view, this underestimates the politico-legal impact of statutory rules on executive decisionmaking.

In place of wide-ranging discretion, balanced budget laws substitute a new and less fluid set of parameters within which fiscal choices must be made by the finance minister. A spending decision that previously required a simple shift in cabinet policy now may be conditioned upon amendments to, or questionable interpretations of, statutory rules. Though, in principle, a majority government can always force passage of amendments, legislative action of any kind requires a relatively major commitment of time, energy and other political resources. It is a slower and more methodical process than executive decisionmaking, and cannot respond as quickly to changing economic conditions or social needs. While the legislation may not be cast in stone, it certainly diminishes the traditional flexibility of budgetary policy. Moreover, there is no question that balanced budget laws are enforceable through the courts to the same extent as any other law. One of the central rationales for having an independent judicial branch is precisely to subject executive office holders to the laws enacted by Parliament. The fact that governments control the means of coercing compliance does not mean they are entitled to ignore judicial orders. Nor does the practical reality of limited access to the courts mean that governments will feel free to flout the law. It is entirely conceivable that an organized interest group, dedicated to promoting smaller government and lower taxes, could seek standing to challenge the legality of a government's budget. In practice, though, governments usually attempt to comply with their legal obligations on their own initiative, to satisfy cultural expectations of democratic responsibility and to avoid the political costs of open noncompliance.<sup>27</sup>

The political enforceability of balanced budget laws is sufficient in itself to have a real impact on fiscal decisions. Such laws may well be intended as political puffery, but they are effective as such precisely because they invoke the rule of law to signal the government's commitment. In the words of one financial commentator, the legislation "does not necessarily guarantee that the stated targets will be met, [but] it does provide an indication that the political will exists to achieve these

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<sup>27</sup> See Grubel, *supra* note 2 at 39.

objectives.”<sup>28</sup> Because they raise these kinds of expectations, such laws “will make it politically more difficult for a future government to choose a deficit strategy in its budget making.”<sup>29</sup> Alberta Premier Ralph Klein has acknowledged this was a central reason for putting his government’s fiscal plan into legislative form, stating that “[w]e’re making it as difficult as possible for another administration, whether it’s Conservative or Liberal, to change our reforms.”<sup>30</sup> This attitude contrasts starkly with the conventional view that fiscal policy decisions should be left open to the elected government of the day.

Amendment, repeal, or outright flouting of the law are, of course, always possible. The history of British Columbia’s *Taxpayer Protection Act*<sup>31</sup> provides a good example. Enacted by the Social Credit government in 1991, the law was repealed shortly after the election of a NDP government the same year. However it was relatively easy in the circumstances to present this as a principled move by a new government that had been harshly critical of the legislation while in opposition. A government that had enacted such a law itself, or that was already in budgetary trouble of its own making, would encounter far more difficulty in justifying a repeal. Short of a sea change in the political environment, amendment or repeal is likely to be seen as a last resort. Rather than risking political backlash, governments will most often simply internalize the legal constraints in formulating their policy options.

The idea of limiting executive dominance over fiscal policy is not immediately unattractive from a democratic point of view. The traditional budget process has rightly been criticized for its lack of transparency, and for the unequal access that different groups have to key decisionmakers. The disproportionate influence of business sector representatives, including tax lawyers and accountants, and the historical attentiveness of Finance Department officials to the concerns of these groups, has been well documented.<sup>32</sup> Indeed, Robert Young has argued

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<sup>28</sup> Toronto Dominion Bank, Department of Economic Research, *Report on Provincial Government Finances* (Toronto: Toronto Dominion Bank, August 1995) at 1. Available on the Internet at <http://www.tdbank.ca/tdbank/library/provincial/overview.html>.

<sup>29</sup> A.M. Maslove & K.D. Moore, “Provincial Budgeting” in C. Dunn, ed., *Provinces: Canadian Provincial Politics* (Peterborough, Ontario: Broadview Press, 1996) 321 at 348.

<sup>30</sup> D. Jenish, *Money to Burn: Trudeau, Mulroney and the Bankruptcy of Canada* (Toronto: Stoddart Publishing, 1996) at 216.

<sup>31</sup> *Supra* note 5.

<sup>32</sup> See, for example, L.T. MacDonald, *Taxing Comprehensive Income: Power and Participation in Canadian Politics, 1962-1972* (Ph.D. Dissertation, Carleton University, 1985) [unpublished]; and R. Young, “Business and Budgeting: Recent Proposals for Reforming the Revenue Budgetary

that the best possible fiscal policy process for business is one that consolidates power in the hands of Finance, the historical champion of pro-capital policies inside government, rather than one that opens budget proposals to extensive scrutiny or debate, by legislative committees, for example.<sup>33</sup> Balanced budget laws are sometimes defended as a means of subjecting fiscal policy to more democratic control. However, in Part III, below, I argue that balanced budget legislation offers little prospect of enhancing executive accountability to those citizens who have been most thoroughly shut out of the fiscal policy process. If anything, they are likely to heighten government's sensitivity to those voices that are already powerful.

I have argued here that balanced budget legislation can potentially influence the course of fiscal policy by delimiting the possible outcomes of executive judgement. However the nature and degree of this impact will depend in part on how the laws are drafted, and this may vary across jurisdictions. I turn now to a more detailed review of the legislative provisions enacted in Canada to date.

B. *Comparative Review of the Legislation:  
Diversity Within a Common Frame*

The disparate details of Canadian balanced budget legislation can be grouped under several recurring policy elements or themes. In different permutations, each of the laws addresses one or more of the following: (1) spending control; (2) deficit control; (3) enforcement; (4) debt management; (5) tax limitation; (6) financial disclosure; and (7) entrenchment. The treatment of each of these policy elements in the various statutes is examined below. The purpose of this taxonomy is not only descriptive but also comparative. Despite the current monotony of political rhetoric about deficit and debt reduction, it shows there is still a range of disagreement about how governments should go about implementing the restraint agenda, about the importance of zero deficits relative to other priorities and needs, and about the degree of latitude that elected governments should have to determine the course of fiscal policy. This in turn suggests some important divergences in underlying visions of the state, also explored below.

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Process" (1983) 9 Can. Pub. Pol. 347.

<sup>33</sup> Young, *supra* note 32 at 357. See also Doern, *supra* note 25 at 25.

## 1. Spending control

When fiscal limitation laws first surfaced in Canada in the early 1990s, the most popular approach was not to target deficits *per se*, but simply to cap the spending side of government budgets.<sup>34</sup> This was the model adopted by the federal government, as well as Alberta and Nova Scotia.<sup>35</sup> The federal and Alberta statutes limited the annual *growth* of expenditures,<sup>36</sup> whereas Nova Scotia's went further, requiring absolute reductions in spending in each of four successive fiscal years.<sup>37</sup>

This model's most striking aspect is that it does not prohibit deficits in any way. Certainly it curtails one part of the budget, but it does not require the overall budget to be balanced. So long as spending stays under the cap, a government may finance this level of expenditure however it likes. It may raise revenue through taxes or other means, or it may borrow to finance a deficit.

Also significant is that not all forms of spending are covered. None of these statutes has attempted to limit the amount spent on interest payments to service accumulated debt.<sup>38</sup> There are other exceptions as well. Alberta, for example, defined program spending to exclude payments on government guarantees, as well as expenditures authorized by special statute.<sup>39</sup> Nova Scotia leaves out election expenses and "Government restructuring costs."<sup>40</sup> Federally, expenditures under

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<sup>34</sup> An early (but short lived) exception was the British Columbia statute, which attempted to control deficits directly: see *supra* note 5; and Part II(B)(2), below, for discussion.

<sup>35</sup> *Supra* note 7 and 8.

<sup>36</sup> The federal *Spending Control Act* *supra* note 7, placed dollar limits on program spending (encompassing both operating and capital expenditures) for five successive fiscal years, effectively restricting increases to less than 4 per cent *per annum*. Alberta's *Spending Control Act* *supra* note 7, imposed a diminishing cap on percentage increases in program spending (operating and capital), declining from 2.5 per cent to 2 per cent over three years.

<sup>37</sup> The Nova Scotia *Expenditure Control Act* *supra* note 8, requires operating expenditures to decline by 3 per cent in each of the 1994-95 and 1995-96 fiscal years, and by 2 per cent in 1996-97 and 1997-98. Capital spending is to decline by 5 per cent in each of these four years: ss. 5, 6. A 1 per cent margin of error is allowed in any one year, provided it is recouped the very next year: ss. 7, 8.

<sup>38</sup> The main argument for excluding debt servicing costs is that they depend on interest rates which are beyond the government's control. However, some argue that these costs should be included anyway, since they are an important factor in the overall budget picture: see *Report of the Standing Committee on Finance* *supra* note 26 at 17-18.

<sup>39</sup> *Supra* note 7, s. 1(d). The latter exception is for appropriations "pursuant to a statute that is not an Act for general supply."

<sup>40</sup> *Supra* note 8, s. 3(b).

the self-financing unemployment insurance system were not counted, nor were expenditures due to a defined emergency.<sup>41</sup> No matter how well justified in policy terms, provisos such as these may encourage attempts to allocate spending items to exempt categories either through creative interpretation of the law, or by preferring these types of spending over other possible instruments when new needs arise.<sup>42</sup>

Another possible means of circumventing spending limits is simply to deliver benefits or subsidies through the tax system, by granting new deductions, credits, or other forms of targeted tax relief. The cost of such tax expenditures is reflected only in a lower figure on the revenue side of the budget, and is not accounted for as direct program spending.<sup>43</sup> They are often criticized as a form of invisible spending, frequently dispensed to more affluent sectors whose claims for public subsidization may not attract much sympathy among the wider body of voters.<sup>44</sup> Indeed, one commentator has argued that business constituencies should hesitate before calling for greater transparency in the tax policy process, because it is precisely the low visibility of tax expenditures that has made them such a useful means for sympathetic cabinet members to circumvent general restraint programs since the late 1970s.<sup>45</sup> Nor can the total cost of tax concessions be easily predicted or controlled; they are open-ended subsidy programs without a predetermined budget limit. The proliferation of tax expenditures, many directed to the business sector, has been identified as an important contributor to the surge of deficits and debt in recent decades.<sup>46</sup>

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<sup>41</sup> *Supra* note 7, s. 2.

<sup>42</sup> See *Report of the Standing Committee on Finance* *supra* note 26 at 4, 5, 11, 20 and 21.

<sup>43</sup> The classic work on tax expenditure theory is S.S. Surrey, *Pathways to Tax Reform: The Concept of Tax Expenditure* (Cambridge, Mass.: Harvard University Press, 1973). For a briefer discussion, see S.S. Surrey, "Tax Expenditure Analysis: The Concept and Its Uses" (1979) 1.2 *Can. Tax'n* 3. The federal government now releases data about the estimated cost of tax expenditures, but this information is not reflected on the expenditure side of the formal budget: see, for example, *Government of Canada Tax Expenditure* (Ottawa: Department of Finance, 1996).

<sup>44</sup> See *Public Budgeting* *supra* note 19 at 38 and 59-61. See also E.A. Lindquist, "Improving the Scrutiny of Tax Expenditures in Ontario: Comparative Perspectives and Recommendations" in Maslove, ed., *supra* note 25, 32. For a recent study on the distributive effects of personal tax expenditures, see F. St. Hilaire, *For Whom the Tax Breaks*, vol. 2.2 (Montreal: Institute for Research on Public Policy, 1996).

<sup>45</sup> Young, *supra* note 32 at 352.

<sup>46</sup> See I. Bakker, "The Politics of Scarcity: Deficits and the Debt" in M.S. Whittington & G. Williams, eds., *Canadian Politics in the 1990s* 4th ed. (Scarborough, Ont.: Nelson Canada, 1995) 55 at 73-76 [hereinafter "Politics of Scarcity"]; I.W. Gillespie, *Tax, Borrow and Spend: Financing Federal Spending in Canada, 1867-1990* (Ottawa: Carleton University Press, 1991); and D. Wolfe, "The Politics of the Deficit" in G.B. Doern, ed., *The Politics of Economic Policy* (Toronto:

Despite recommendations from a parliamentary committee to close the “tax expenditure loophole,”<sup>47</sup> no such amendments were made to the federal legislation. The Nova Scotia spending control law is equally vulnerable to this problem, potentially creating an incentive to satisfy particular constituencies with tax relief while shifting the burden of fiscal restraint onto those groups with less voice in the formation of tax policy. Interestingly, Alberta did attempt to bring tax expenditures under the purview of its spending cap, by providing that the cost of any new programs delivered in the form of tax relief would automatically lower the ceiling on direct spending.<sup>48</sup> However, this provision was quickly rendered obsolete, as Alberta graduated to a more aggressive form of balanced budget law aimed at eliminating deficits entirely.

The Nova Scotia Act is today the only surviving example of spending control legislation in Canada. The federal Act reached the end of its five year span and was not renewed. At that point, the government had actually underspent its limit by more than twenty billion dollars as a consequence of major cuts introduced by the Liberal government in its first three budgets.<sup>49</sup> Declaring that “extension of this Act is clearly not required to demonstrate control over government spending,”<sup>50</sup> the 1996 budget marked an end to federal involvement with balanced budget legislation, at least for the time being.

The apparent laxity of the federal spending cap should not necessarily be taken as evidence that spending controls are ineffectual as a means of forcing fiscal restraint. Obviously, this is a function of the severity of the limits, rather than some inherent feature of the model itself. Indeed, some American proponents of fiscal limitation laws argue that spending controls are a superior instrument if one’s goal is to reduce the overall size of the public sector.<sup>51</sup> A balanced budget

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University of Toronto Press, 1985). See also J. Cronin & T. Radke, “The Old and the New Politics of Taxation: Thatcher and Reagan in Historical Perspective” (1987) *Socialist Reg.* 263.

<sup>47</sup> *Report of the Standing Committee on Finance* *supra* note 26 at 22 and 25.

<sup>48</sup> *Supra* note 7, s. 3(5). A “tax expenditure” was defined broadly as “a reduction in money otherwise payable to the Crown in right of Alberta that funds, in whole or in part, a program, service or benefit”: s. 1(e).

<sup>49</sup> Canada, Department of Finance, *Budget Plan: supplementary information and notices of Ways and Means Motions/ tabled in the House of Commons by the Honourable Paul Martin, Minister of Finance* (Ottawa: Department of Finance, 6 March 1996) Table A4.1 at 136.

<sup>50</sup> *Ibid.* at 137.

<sup>51</sup> See T. King-Meadows & D. Lowery, “The Impact of the Tax Revolt Era State Fiscal Caps: A Research Update” (1996) 16 *Pub. Bud. Fin.* 102 at 102-103; and A. Wildavsky, *How To Limit Government Spending* (California: University of California Press, 1980) at 12-14. Evidence on the effectiveness of American tax and expenditure limitations is mixed. One recent study concluded they have had virtually no effect in containing the size of government budgets: D.G. Bails, “The

requirement, by contrast, allows spending to grow indefinitely so long as it is financed by new revenues. Nor should one discount the potential political and discursive impact of a spending control law in terms of how it may shape governmental priorities, the choice of policy instruments to effect those priorities, and the criteria that are used to assess a government's success or failure. As discussed in Part III, below, these concerns about the production of public agendas are as relevant to spending limitations as they are to the anti-deficit laws that have succeeded them.

## 2. Deficit control

Early attempts to regulate the spending side of government accounts have given way to a new generation of laws aimed directly at the goal of a balanced budget. While Nova Scotia has stuck by its spending cap, the approach adopted by the Northwest Territories, Alberta, Saskatchewan, Manitoba, Quebec, and New Brunswick focuses instead on restricting or eliminating budget deficits.<sup>52</sup> In effect, anti-deficit laws attempt to limit government's ability to finance expenditures by borrowing. What they can legally spend over a given period is thus made contingent on how much they can raise via taxes, user fees, privatizations, or other revenue-generating measures.

The anti-deficit theme is pervasive in balanced budget legislation and certainly forms its symbolic centrepiece across the country (save for Nova Scotia). But a close comparison reveals that not all anti-deficit provisions are equally onerous or unflinchingly mandatory. Three major lines of difference can be identified: (a) is budget balance measured on an annual or multi-year cycle?; (b) what portions of government spending and revenues are counted in determining if there is a deficit?; and (c) can borrowing be resorted to in the event of recessions or other contingencies? Each of these features is examined in more detail below. It is quickly apparent that, on all counts, Alberta's anti-deficit rules define the outer limits of severity, with Manitoba not far behind. At the other end of the spectrum are the more flexible versions of

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Effectiveness of Tax-Expenditure Limitations: A Re-evaluation" (1990) 49 Am. J. Econ. & Soc. 223. Others have found evidence of some effect, usually modest: see H.W. Elder, "Exploring the Tax Revolt: An Analysis of the Effects of State Tax and Expenditure Limitation Laws" (1992) 20 Pub. Fin. Q. 47; J.M. Poterba, "State Responses to Fiscal Crises: The Effects of Budgetary Institutions and Politics" (1994) 102 J. Pol. Econ. 799; and C. Sherwood-Call, "Tax Revolt or Tax Reform? The Effects of Local Government Limitation Measures in California" (1987) 2 Fed. Res. Bank S.F. Econ. Rev. 57.

<sup>52</sup> *Supra* notes 9, 11, and 13-16.

Saskatchewan and New Brunswick. Quebec and the Northwest Territories fall somewhere in between.

a) *Annual versus multi-year balancing*

All Canadian governments budget on an annual cycle. That is, a proposed budget is tabled in advance of each fiscal year, accompanied by the government's prospective estimates of spending and revenue. Legislative approval of the budget is followed by a series of supply votes to authorize the appropriation of funds for public expenditure. When spending requirements exceed available revenues, the government typically goes into financial markets and borrows to finance the deficit.<sup>53</sup> Anti-deficit provisions, however, aim to preclude or restrict this ability to borrow.

Alberta has the most unforgiving anti-deficit rule in the country. The *Balanced Budget and Debt Retirement Act* provides that "[e]xpenditures during a fiscal year must not be more than revenue."<sup>54</sup> The government is thus required to balance every annual budget. In principle, this amounts to a complete ban on deficits and removes borrowing from the means available to government to finance its activities. No other province quite matches Alberta's dogged insistence upon annual balance. The closest comparators are Manitoba, the Northwest Territories, and Quebec, all of which impose some form of modified annual-balance requirement.

Manitoba begins with an absolute rule that "the government is not to incur a deficit,"<sup>55</sup> and adds that if a deficit *is* incurred, it must be offset by an equivalent surplus the very next fiscal year.<sup>56</sup> Notably, Manitoba has created a Fiscal Stabilization Fund that can be used to top up revenues in recessionary years.<sup>57</sup> The creation of this fund

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<sup>53</sup> Procedures for authorizing and monitoring government spending and borrowing are set out in federal and provincial Financial Administration Acts. See, for example, *Financial Administration Act*, R.S.C. 1985, c. F-11.

<sup>54</sup> *Supra* note 9, s. 2: applicable to 1997-98 and subsequent fiscal years. A zero deficit was also required in 1996-97 pursuant to a predecessor statute, the *Deficit Elimination Act* *supra* note 9, s. 2, which mandated declining deficits commencing in the 1993-94 fiscal year.

<sup>55</sup> Manitoba Act, *supra* note 14, s. 2: applicable to 1995-96 and subsequent fiscal years.

<sup>56</sup> *Ibid.*, s. 4(1). My reading is that this section does not retroactively legalize a deficit, even if it is recouped the following year, but is an additional requirement that arises whenever the zero deficit rule is breached. See the discussion of Manitoba's enforcement provisions, in Part II(B)(3), below.

<sup>57</sup> *The Fiscal Stabilization Fund Act* S.M. 1989-90, c. 16.

acknowledges implicitly that it may be impossible to balance the budget within every single year, and that surplus revenues from strong years may be needed to finance deficits in weaker years.<sup>58</sup>

The Northwest Territories Act calls for budgets to be balanced over a two year cycle at most, limiting any annual deficits to no more than 1 per cent of revenues, which must be made up with a surplus in the following year.<sup>59</sup> No deficit is allowed under any circumstances in 1998-99, after which the Territories are to be partitioned to create Nunavut and the Western Territory.<sup>60</sup> The statute's preamble expresses concern that "it will be necessary to divide the assets and liabilities of the Northwest Territories in a fair and equitable manner," and a wish to ensure that "no significant financial burden encumbers either the Nunavut Territory or the new Western Territory."<sup>61</sup> In light of the unique political context addressed by this law, it is not likely sufficient to assess the Northwest Territories legislation according to the same criteria as the provinces.<sup>62</sup> Nonetheless, the potential problems associated with balanced budget legislation likely have some relevance to the Territories, particularly if the law is retained following partition.

Quebec's law schedules the gradual elimination of its budget deficit over a period of years, and provides that "[n]o deficit shall be incurred from the fiscal year 1999-2000 onward."<sup>63</sup> As in Manitoba, any shortfall in one year must be offset by an equivalent surplus in the next fiscal year, but Quebec limits this proviso to shortfalls of less than one billion dollars.<sup>64</sup> Larger deficits, which are permitted in the event of certain contingencies, are subject to a complicated five-year management scheme.<sup>65</sup>

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<sup>58</sup> Section 9 of the Manitoba Act, *supra* note 14, requires any budget surplus in a particular year to be devoted first to bringing the Fiscal Stabilization Fund up to its target level of 5 per cent of expenditures.

<sup>59</sup> Northwest Territories Act, *supra* note 11, ss. 2, 3.

<sup>60</sup> *Ibid.*, preamble, s. 3(3).

<sup>61</sup> *Ibid.*, preamble.

<sup>62</sup> For an overview of the Nunavut settlement and the financial and other aspects of implementation, see K. Cameron & G. White, *Northern Governments in Transition: Political and Constitutional Development in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: Institute for Research on Public Policy, 1995) c. 4.

<sup>63</sup> Quebec Act, *supra* note 15, s. 6.

<sup>64</sup> *Ibid.*, s. 8.

<sup>65</sup> See Part II(B)(2)(c), below, for further discussion.

All of these requirements for annual or modified annual balance can be contrasted with the approach taken in Saskatchewan and New Brunswick, where budgetary balance is measured over a multi-year cycle. Saskatchewan's *Balanced Budget Act* calls on the government to create a four-year financial plan after every election, and provides that "the total expenses for the four fiscal years must balance with or be less than the total revenues for the same four fiscal years."<sup>66</sup> Under this model the government continues to prepare a budget for each fiscal year and may run a deficit in any particular budget, provided overall balance is achieved over the four years.<sup>67</sup> Similarly, New Brunswick's *Balanced Budget Act* aims to have revenues meet expenditures over every four-year "fiscal period."<sup>68</sup> British Columbia's short-lived *Taxpayer Protection Act* established an even longer five-year cycle for measuring fiscal balance.<sup>69</sup> As discussed in Part III, below, the multi-year cycle preserves greater flexibility for governments in responding to economic and social conditions, and is likely at least to mitigate some of the dangers of prohibiting borrowing altogether.

#### b) Coverage

The statutes are uneven in terms of what revenues and expenditures are counted in determining whether balance has been achieved. Certain forms of spending may be explicitly exempted by the legislation, or may be handled outside the regular budget by convention. One important area of disagreement is whether the law should cover capital expenditures, or just current account spending. Unlike private organizations, Canadian governments traditionally have not separated these two elements of the budget. Public finance analysts have criticized this practice, pointing out that capital expenditures represent long-term investments that normally must be financed by borrowing, and should be amortized over time for accounting purposes. Lumping in the entire

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<sup>66</sup> Saskatchewan Act, *supra* note 13, ss. 3(1), 4(1).

<sup>67</sup> In Manitoba, New Democratic Party opposition members held up the Saskatchewan Act, *supra* note 13, as a more flexible and prudent model, and proposed an amendment to adopt a similar four-year budget cycle: Manitoba, Legislative Assembly, *Debates and Proceedings* 1st Sess., 36th Leg., vol. XLV, No. 42 (4 October 1995) at 3651, R. Wowchuk; and No. 57 (27 October 1995) at 4318, K. Lamoureux.

<sup>68</sup> New Brunswick Act, *supra* note 16, s. 3. The Act provides for a "first fiscal period" lasting only three years, and then applies to every subsequent four-year period: s. 1.

<sup>69</sup> *Supra* note 5, ss. 8-10.

cost of a new capital investment with the current operating budget gives a falsely inflated picture of annual expenditures and deficits.<sup>70</sup> The analogy at the household level would be a requirement that cars, houses, and post-secondary education be fully paid for in cash in the year they are purchased. Put another way, there is a difference between borrowing to finance current consumption of goods and services, and borrowing to finance capital investments that will produce returns to the economy over a lengthy period.<sup>71</sup>

One undesirable side effect of this failure to distinguish capital and current budgets is that it allows (and perhaps encourages) governments to dispose of Crown assets to achieve short term, albeit misleading, improvements in the budgetary picture. Because there is no separate accounting for the net value of capital assets, the proceeds from privatizing a public asset can only be reflected as a one time increase in annual revenues, while the permanent decline in the value of Crown assets is not reflected anywhere.<sup>72</sup> One member of the legislative assembly protested this aspect of the Manitoba bill in the following terms:

a family does not balance its budget by selling its car or selling its house or cashing in its savings. That is not a balanced budget in any meaningful sense of the word. Any family who did so would clearly understand that they had sold an asset, that they had not balanced their budget. They may have met their daily needs for food, but they would have done so at the risk of impoverishing their future ability to meet those needs.<sup>73</sup>

Thus, Allan Maslove and Kevin Moore argue that selling off Crown assets may serve political agendas to reduce or alter the role of government in society, but “the deficit reduction rationale behind such moves is weak at best.”<sup>74</sup>

New Brunswick appears to be the only jurisdiction that has recognized this sensible distinction in crafting its balanced budget law. The Statute speaks only to “ordinary expenditures” and “ordinary revenues” of the province,<sup>75</sup> leaving room for borrowing to finance

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<sup>70</sup> See, for example, *Public Budgeting* *supra* note 19 at 125.

<sup>71</sup> Maslove & Moore, *supra* note 29 at 340.

<sup>72</sup> *Ibid.* at 348.

<sup>73</sup> Manitoba, Legislative Assembly, *Debates and Proceedings* 1st Sess., 36th Leg., vol. XLV, No. 57 (27 October 1995) at 4321, T. Sale.

<sup>74</sup> *Supra* note 29 at 348.

<sup>75</sup> New Brunswick Act, *supra* note 16, ss. 1, 2.

capital spending on infrastructure.<sup>76</sup> This is similar to the practice of several American state governments which apply their balanced budget requirements only to the operating portions of the budgets.<sup>77</sup>

None of the other anti-deficit laws currently in force in Canada make any distinction between current and capital accounts. This is not to suggest they necessarily cover all forms of spending or all receipts. Typically, the statutes provide that “revenues” must meet or exceed “expenditures,” but as with any other law, such terms are open to interpretation and in particular depend upon the financial accounting policies adopted by a government. Various items may be segregated from general revenues in special funds established for particular programs, attributed to independent agencies, or otherwise treated as “off budget.” One American study described this ambiguity as follows:

The percent of budget and the funds covered by balanced budget requirements are not fixed. Rather, they represent judgments of state officials and interpretations of generally worded requirements. For example, New Jersey’s requirement does not specify any particular funds that are covered, but state officials interpret it to cover all funds other than trust funds. In any state, the creation of new funds ... raises the question of whether these funds are covered by the balanced budget requirement. That judgment may change over time.<sup>78</sup>

In Canada, Alberta’s balanced budget law is framed very widely to cover “expenditures of the Crown for all purposes” and “revenue of the Crown from all sources,” with the Crown defined to include most (but not all) provincial agencies and corporations.<sup>79</sup> Saskatchewan’s legislation is narrower, covering only revenues and expenses of the general revenue fund.<sup>80</sup> The point here is simply that the practical impact of a balanced budget law depends in part upon what financial accounts it is understood

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<sup>76</sup> For example, the New Brunswick budget, Department of Finance, *Budget 1996-1997* (Fredericton: Department of Finance, 15 February 1996) at 10, reported that the government was on target to achieve cumulative balance in its ordinary accounts over the three year fiscal period ending in 1995-96, as required by the legislation, and even anticipated a surplus in the order of 158 million dollars. Net capital spending over the period was expected to exceed the surplus and add to the province’s cumulative debt, but this was accounted for separately and did not violate the balanced budget provision.

<sup>77</sup> See National Association of State Budget Officers, *State Balanced Budget Requirements: Provisions and Practice* (Washington, D.C.: National Association of State Budget Officers, 24 June 1992) at 2 [hereinafter NASBO]. R. Eisner says that “most state governments maintain separate capital budgets to which the balanced budget provision [in the state Constitution] does not apply”: “The B.B.A.: A Spent Idea” *The Nation* (24 February 1997) 16 at 18. However, the earlier NASBO study found that only a minority of states exempted their capital budgets.

<sup>78</sup> *Ibid.*

<sup>79</sup> Alberta Act, *supra* note 9, s. 1.

<sup>80</sup> Saskatchewan Act, *supra* note 13, s. 2.

to encompass, and that this may vary among jurisdictions and over time in less than fully transparent ways.

c) *Contingency clauses*

In some statutes, borrowing restrictions are eased in the event of special circumstances or defined crises. Contingency clauses have been drafted by some governments to cushion themselves against serious economic downturns or extraordinary expenses. Predictably, however, the escape hatches are of varying breadth. The Northwest Territories has the most open-ended saving clause, allowing the Legislative Assembly to forgive a deficit if it resulted from “circumstances ... beyond the reasonable control of the Executive Council.”<sup>81</sup> In Saskatchewan, the government’s progress in achieving four-year balance is to be measured without reference to any “major, unanticipated, identifiable event or set of circumstances” that has a “dramatic impact on expenses or revenues.”<sup>82</sup> There is no definition of the precise nature or order of magnitude of the events contemplated, which might be read to encompass even a modest recession. Quebec permits annual deficits to exceed one billion dollars if they result from a “disaster,” a “significant deterioration of economic conditions,” or a “substantially” reduced federal transfer payment.<sup>83</sup> Manitoba has a more narrowly defined set of exemptions for deficits arising from a war or a “natural or other disaster ... that could not have been anticipated and affects the province ... in a manner that is of urgent public concern,” or from “a reduction in revenue of 5 per cent or more.”<sup>84</sup>

Alberta stands out for its lack of any contingency clause. Though New Brunswick’s statute also has no saving provision, its multi-year period for achieving budget balance arguably serves a similar function.

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<sup>81</sup> Northwest Territories Act, *supra* note 11, s. 5(3).

<sup>82</sup> Saskatchewan Act, *supra* note 13, s. 4(2).

<sup>83</sup> Quebec Act, *supra* note 15, s. 10. In such cases, the government must devise a five year plan for offsetting the deficit.

<sup>84</sup> Manitoba Act, *supra* note 14, s. 3(2). The lieutenant governor in council is empowered to declare conclusively whether one of these contingencies has occurred: s. 3(3). Presumably, the flood of 1997 would qualify.

### 3. Enforcement

Balanced budget legislation is enforceable against governments in the same manner as other laws: mostly through willing compliance assisted by political pressure, and ultimately through the courts.<sup>85</sup> These laws are not merely hortatory. Almost always, they use clear mandatory language such as “[n]o deficit shall be incurred ... ,” or expenditures “must not”<sup>86</sup> exceed revenue, or government “must balance”<sup>87</sup> the books. The exception is New Brunswick, where a zero deficit is prescribed only as “the objective of the Government.”<sup>88</sup>

Two of the statutes also subject cabinet ministers to extraordinary penalties for non-compliance with anti-deficit rules. Manitoba imposes an automatic 20 per cent salary reduction on all cabinet members if the province incurs a deficit in any year, rising to 40 per cent if there is a second consecutive deficit.<sup>89</sup> In the Northwest Territories, if deficit restrictions are contravened the Legislative Assembly must decide whether to recommend dismissal of the Executive Council, taking into consideration whether there were circumstances “beyond [its] reasonable control.”<sup>90</sup> These potential penalties create very strong incentives for cabinet ministers to impose tough budgetary measures, not only to avoid embarrassment or loss of power as government officers, but also to protect their personal interests.

It is also important that all of the anti-deficit provisions appear to refer to the actual budgetary position of the government, rather than the budget approved by the legislature in advance of each fiscal year. The budget document tabled in the legislature is only a prediction of revenues and expenditures for the coming year, based on economic forecasting assumptions that rest to some degree on opinion and judgment. In the United States, most fiscal limitation laws require states only to balance their proposed budget or the budget approved by the legislature, rather than balancing the actual budget at year-end.<sup>91</sup> By contrast, the Canadian laws take pains to demand a reconciliation of the

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<sup>85</sup> See Part II(A), above, for discussion.

<sup>86</sup> Alberta Act, *supra* note 9, s. 2; and Northwest Territories Act, *supra* note 11, s. 2.

<sup>87</sup> Saskatchewan Act, *supra* note 13, ss. 3-4.

<sup>88</sup> New Brunswick Act, *supra* note 16, s. 2.

<sup>89</sup> Manitoba Act, *supra* note 14, s. 7.

<sup>90</sup> Northwest Territories Act, *supra* note 11, ss. 5(3), 5(4).

<sup>91</sup> NASBO, *supra* note 77 at 1.

government's budget plan with the actual public accounts for the year. In the Northwest Territories, for example, the legislature monitors compliance with the law by examining the public accounts within 180 days after the fiscal year ends.<sup>92</sup> Manitoba and Alberta also check the budget against interim financial reports as the year progresses.<sup>93</sup> Even in New Brunswick the balanced budget objective is clearly defined by reference to expenditures and revenues, as reported in the public accounts.<sup>94</sup> The requirement that actual fiscal performance live up to budget forecasts makes the laws more rigorous and enforceable, at least in political terms, and leaves little room for governments to rely on differences of opinion about economic prospects for the upcoming year.

#### 4. Debt management

Alberta and Manitoba not only ban deficits prospectively, but also provide for the retirement of old debts accumulated from budget shortfalls of past years. Both have enacted detailed timetables for the repayment of outstanding debt.<sup>95</sup> Perhaps more importantly, both have placed restrictions on the use of future budget surpluses. In Alberta, any surplus, no matter how large, must be applied to reduce the debt.<sup>96</sup> Thus, a predicted \$2.2 billion surplus for the 1996-97 fiscal year will be dedicated entirely to debt reduction, and none will be used to restore funding to programs or services the province has cut severely in recent years.<sup>97</sup> Manitoba's law is less rigid. Surpluses must be used first to top up the province's stabilization fund, but can then be kept in the operating budget or applied to reduce debt at the minister of finance's discretion.<sup>98</sup> The effect of both statutes, however, is to project the fiscal

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<sup>92</sup> Northwest Territories Act, *supra* note 11, ss. 4, 5.

<sup>93</sup> Manitoba Act, *supra* note 14, ss. 5-7; and Alberta Act, *supra* note 9, s. 11.

<sup>94</sup> New Brunswick Act, *supra* note 16, s. 1.

<sup>95</sup> The Alberta Act, *supra* note 9, s. 4, requires elimination of the debt by 2021-22, but the province has announced it will accelerate the repayment schedule to 2010: Government of Alberta, News Release, "Alberta's net debt to be gone in thirteen years" (24 June 1996). The Manitoba Act, *supra* note 14, s. 8, has prescribed annual payments to a "Debt Retirement Fund," that are expected to eliminate the debt in thirty years: see Guide to the Draft Legislation, available on the Internet at [http://www.gov.mb.ca/manitoba/finance/text/bda\\_tx02.html](http://www.gov.mb.ca/manitoba/finance/text/bda_tx02.html).

<sup>96</sup> Alberta Act, *supra* note 9, s. 6.

<sup>97</sup>D. Henton, "Klein Delivers Albertans News of Budget Surplus" *Toronto Star* (5 February 1997) A11.

<sup>98</sup> Manitoba Act, *supra* note 14, s. 9.

restraint agenda forward over a long period into the future. Without saying so explicitly, they entrench debt elimination as the top priority for many years, taking precedence over state action on any other front.

Saskatchewan has also addressed the need for debt management, but in a more procedural manner that avoids stating how quickly debt should be retired or how it should rank relative to other fiscal priorities of a particular government. The statute obliges every government to present a four-year debt management plan after its election, but does not dictate the plan's content in any way.<sup>99</sup> The cumulative balance of surpluses and deficits over time is to be recorded in a debt reduction account,<sup>100</sup> but nothing appears to demand that this account actually be used to retire outstanding debt. The remaining jurisdictions say nothing about retirement of debt, and in fact in Quebec, a government that achieves a surplus is expressly permitted to incur equivalent "overruns" in subsequent fiscal years.<sup>101</sup>

## 5. Tax limitation

Manitoba and Alberta stand out prominently as the only two provinces that have enacted a tax limitation alongside an anti-deficit law. This is a combination of enormous significance. Restricting the ability to generate new revenues through taxation further narrows the range of fiscal choices open to government, and heightens the pressure for expenditure cuts to balance the budget. Indeed, Geoffrey Brennan and James Buchanan argue that tax limitations are almost constitutional in nature, because they alter so fundamentally "the rules of the politico-fiscal game."<sup>102</sup>

In both provinces, referenda must be held if the government proposes certain kinds of new tax measures. Manitoba prohibits any rate increase in the province's four major taxes unless the government first obtains *majority approval* in a referendum.<sup>103</sup> It appears that a negative referendum vote is intended to bind the government. Alberta's

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<sup>99</sup> Saskatchewan Act, *supra* note 13, ss. 3(1), 3(4), 3(5).

<sup>100</sup> *Ibid.*, s. 5.

<sup>101</sup> Quebec Act, *supra* note 15, s. 9.

<sup>102</sup> G. Brennan & J.M. Buchanan, "The Logic of Tax Limits: Alternative Constitutional Constraints on the Power to Tax" (1979) 32 Nat'l Tax J. (Supplement) 11.

<sup>103</sup> Manitoba Act, *supra* note 14, s. 10. The taxes covered are the provincial income tax, the retail sales tax, the health and post secondary education tax and the tax on commercial purchases of electricity, natural gas, etc. under Part I of the *Revenue Act* R.S.M. 1987, c. R150.

*Taxpayer Protection Act*<sup>104</sup> forbids the introduction of a general sales tax without prior approval by referendum. Unlike the Manitoba law, this phrasing avoids any formal commitment to obtain majority approval. However in its 1997 budget, the Alberta government appeared to be moving further in the direction of Manitoba. It pledged to introduce more sweeping legislation, “to cap personal and corporate income taxes, and perhaps other taxes, at current levels—unless and until Albertans vote to increase taxes through a referendum.”<sup>105</sup>

It is unclear what effect the tax referendum laws will have on the level or mix of taxation in these provinces. The use of referenda may be more flexible than British Columbia’s *Tax and Consumer Rate Freeze Act* which bans the government entirely from introducing new taxes or increasing most existing taxes until the end of the century.<sup>106</sup> With a referendum law, voters, in theory, could always approve a tax increase. However the American experience, albeit from a different context, suggests that voters tend to support referendum initiatives to reduce levels of taxation, even when they oppose any reduction in the public services from which they benefit.<sup>107</sup> In Part IV, below, I contest the simplistic assumption that such referenda necessarily promote true political dialogue or democratic outcomes. I argue instead that tax limitation laws are more likely to discourage governments from taking active measures to promote equality, and facilitate the process of marginalizing as “special interests” those groups most severely harmed by expenditure restraint.

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<sup>104</sup> *Supra* note 17.

<sup>105</sup> Alberta, Department of Finance, *Budget '97 Post-Election Update: Budget and Business Plan Documents*, Part 2 (Edmonton: Queen’s Printer, 1997) at 2-3. The budget speech also likened taxation to the beating of slaves (citizens) by a slavemaster (government).

<sup>106</sup> *Supra* note 17. Unlike Alberta and Manitoba, British Columbia is not legally required to balance its budget. However there is tremendous political pressure on Finance Minister Andrew Petter to eliminate the deficit. In light of the tax freeze, fiscal policy in British Columbia will likely be tilted heavily in favour of spending cuts.

<sup>107</sup> See, for example, J. Citrin & D.P. Green, “Policy and Opinion in California After Proposition 13” (1985) 38 Nat’l Tax J. 15; J. Citrin, “Do People Want Something for Nothing: Public Opinion on Taxes and Government Spending” (1979) 32 Nat’l Tax J. (Supplement) 113; H.F. Ladd & J. Boatwright Wilson, “Why Voters Support Tax Limitations: Evidence from Massachusetts’ Proposition 2-1/2” (1982) 35 Nat’l Tax J. 121; and R.M. Stein, K.E. Hamm & P.K. Freeman, “An Analysis of Support for Tax Limitation Referenda” (1983) 40 Pub. Choice 187.

## 6. Financial disclosure

It is popular to impose rigorous financial reporting rules in conjunction with a balanced budget law. Many of the statutes require periodic special reports and updates on the government's fiscal progress, and assign responsibility to the traditional guardians of the treasury—finance ministers, treasury boards, and auditors general—to audit compliance with the Act. Several statutes also attempt to limit government's ability to make convenient accounting changes or overly optimistic economic forecasts. In Saskatchewan, for example, a significant change in accounting practices may not be used for the purpose of determining whether a four-year financial plan has been fulfilled.<sup>108</sup> And Alberta imposes a set of conservative assumptions to be used in forecasting future revenues from natural resources and corporate income taxes.<sup>109</sup> Notably, this is the sole concession in Alberta's statute to the cyclical variability of economic growth and revenues.

All of these mechanisms are directed to financial transparency and all hold out a promise of greater accountability in government, a theme which also resonates in the provisions for tax referenda and the sudden enthusiasm for penalizing cabinet ministers. While one hesitates to criticize any attempt to ensure greater openness in government, it is important at the same time to assess the nature of the information provided, and also what is not disclosed. I argue later in this article that, far from giving us unmediated access to the truth about government finances, balanced budget laws intensify the production of those types of information that help to construct a particular version of economic reality; one in which lower taxes, spending, and deficits are assumed to promote the interests of all citizens alike.

## 7. Entrenchment

Like all statutes, balanced budget laws will extend beyond the life of the governments that introduced them and, unless amended or repealed, will affect the budgeting practices of future governments. As noted earlier, however, legislative entrenchment is highly unusual in the

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<sup>108</sup> Saskatchewan Act, *supra* note 13, s. 4(3). Similar provisions can be found in the Manitoba Act, *supra* note 14, s. 3(6), and the New Brunswick Act, *supra* note 16, ss. 5-6.

<sup>109</sup> Alberta Act, *supra* note 9, s. 8.

area of fiscal policy and clashes with strong traditions of executive prerogative and discretion around the budget.<sup>110</sup> Furthermore, amendment or repeal of these laws, depending on the circumstances, may have particularly heavy political costs for a government.

In addition to these factors, one province, Manitoba, has attempted to entrench its balanced budget law more explicitly. The Act provides that if a different party is elected into power, the new government is relieved of its obligation to balance the budget, but *only* for the fiscal year in which the election is held.<sup>111</sup> In addition, Manitoba requires that any bill to “amend, repeal, override or suspend the operation of” the statute must be referred to a standing committee for hearings with at least seven days notice to the public.<sup>112</sup> These hurdles, while not insurmountable, will add to the usual inconvenience and political risks of amending legislation, or of failing to comply.

### III. CONTRASTING IMAGES OF THE STATE: WELFARE LIBERALISM AND NEOLIBERALISM

The jurisdictional differences highlighted in this article are more than mere idiosyncratic details; taken together, they suggest that legislators have been influenced by divergent and ideologically specific understandings of the state’s role in modern society. Balanced budget laws can be viewed as a new front in an ongoing struggle over modes of governance, in particular the neoliberal challenge to post-war conceptions of the liberal welfare state.<sup>113</sup> The central precept of neoliberalism is that market forces are to be preferred over state regulation as the primary mechanism for allocating resources and distributing income and wealth. The preference for markets is

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<sup>110</sup> See Part II(A), above.

<sup>111</sup> Manitoba Act, *supra* note 14, s. 4(2).

<sup>112</sup> *Ibid.*, s. 12.

<sup>113</sup> I adopt the term “neoliberalism” here because it best captures the market libertarian thrust of prevailing economic policies that is the central concern of this paper. Others use “neoconservatism” to describe the same broad trends and in many respects the two terms are interchangeable, though the latter implies a stronger and more explicit role for the state in enforcing a conservative social morality, for example by shoring up traditional gender roles and familial forms: see N. Fraser, “Clintonism, Welfare, and the Antisocial Wage: The Emergence of a Neoliberal Political Imaginary” (1993) 6 *Rethinking Marxism* 9 [hereinafter “Clintonism”]; and R. Grinspun & R. Kreklewich, “Consolidating Neoliberal Reforms: ‘Free Trade’ as a Conditioning Framework” (1994) 43 *Stud. Pol. Econ.* 33 especially note 3. See also S. Gill, “Globalisation, Market Civilisation, and Disciplinary Neoliberalism” (1995) 24 *Millennium* 399.

constructed not only as a matter of choice, but as an absolute necessity if Canada is to thrive in an increasingly global economy. Neoliberalism asserts that, in order to compete in international markets, domestic policies must be oriented to reducing government's participation in the economy and minimizing state regulation of trade, investment and production.<sup>114</sup> The provision of public services is to be privatized wherever possible, and residual state operations restructured to emulate private enterprise.<sup>115</sup> As the state downsizes and marketizes, there is "a corresponding expansion of the scope of individual—especially entrepreneurial—action."<sup>116</sup> The minimalist view of the state is complemented by a neoliberal image of the consumer-citizen who is above all self-reliant and responsible to secure her welfare through market activity and/or the private resources of family, resorting to government assistance only in the most desperate circumstances.<sup>117</sup>

Both the normative and the empirical assertions of neoliberalism have been pilloried by critical scholars. In particular, the claim that nation state power is only declining in the face of global economic pressures has been countered with much evidence that governments remain crucial partners of capital in facilitating a more internationalized market, and in fact in some areas are intensifying their surveillance and regulation of citizens to that end.<sup>118</sup> The rhetoric of minimal government rests upon a false dichotomization of state and market that elides the essential role of local governments in creating the conditions

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<sup>114</sup> See I. Bakker, "Deconstructing Macro-economics Through a Feminist Lens" in J. Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 31 at 33-36 [hereinafter *Women and Policy*]; J. Brodie, *Politics on the Margins: Restructuring and the Canadian Women's Movement* (Halifax: Fernwood Publishing, 1995) especially c. 1 and 4 [hereinafter *Politics on the Margins*]; and P. Resnick, "The Ideology of Neo-Conservatism" in W. Magnusson *et al.*, eds., *The New Reality: the Politics of Restraint in British Columbia* (Vancouver: New Star Books, 1984) 131.

<sup>115</sup> A classic work advocating this type of public sector restructuring is D. Osborne & T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Penguin Books, 1992). For two quite different critical analyses see M. Trebilcock, *The Prospects for Reinventing Government* (Toronto: C.D. Howe Institute, 1994); and H.W. Arthurs, "Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29.

<sup>116</sup> H.W. Arthurs & R. Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L.J. 1 at 9.

<sup>117</sup> See J. Brodie, "Restructuring and the New Citizenship" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) 126 [hereinafter *Rethinking Restructuring*]. See also Fraser, *supra* note 113.

<sup>118</sup> See S. Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996) at 27-30. See also G. Laxer, "Social Solidarity, Democracy and Global Capitalism" (1995) 32 Can. Rev. Soc. & Anth. 287.

necessary for internationalized market activity. In fact Nancy Fraser asserts that, far from removing the state from the private economy, one of the distinctive features of neoliberalism is the way it “allies government more directly with capital,”<sup>119</sup> to deliver marketized versions of services formerly conceived as public goods. In Alberta, for example, Claude Denis argues that the state’s reach has not been reduced so much as redirected to the task of acculturating and coercing citizens into the new economic order, through legislative measures, media campaigns, and other means.<sup>120</sup>

Despite its internal contradictions and normative flaws, however, neoliberal ideology presently exerts a high degree of influence over policymaking in Canada. The emerging anti-state consensus has transformative implications for the public sector in general<sup>121</sup>, and for fiscal policy in particular. Within welfare state liberalism, taxation and expenditure policy are seen as tools by which an activist state can both stimulate the private economy and achieve a better distribution of resources than that accomplished by market forces operating alone.<sup>122</sup> Both these objectives are regarded skeptically from a neoliberal vantage point. State intervention in the economy is thought to undermine market efficiency and hence to destroy longer term productivity. Freeing up market forces is seen not only as the best economic policy, but as a fairer and morally better way to provide for human welfare. Thus neoliberalism has been associated with a strong hostility toward government spending, taxation and deficits alike, despite the apparent contradictions of pursuing all of these agendas at once.<sup>123</sup> Economic arguments for deficit reduction are often coupled tightly with a neoliberal ideology. Maslove and Moore take the view that deficit elimination is in many cases simply “a shorthand or code word for smaller governments ... and less intervention in private markets.”<sup>124</sup>

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<sup>119</sup> “Clintonism”, *supra* note 113 at 15.

<sup>120</sup> C. Denis, “‘Government Can Do Whatever It Wants’: Moral Regulation in Ralph Klein’s Alberta” (1995) 32 *Can. Rev. Soc. & Anth.* 365. See also M. Kline, “Blue Meanies in Alberta: Tory Tactics and the Privatization of Child Welfare” in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) [forthcoming].

<sup>121</sup> Arthurs, *supra* note 115 at 46.

<sup>122</sup> See *Public Budgeting* *supra* note 19 at 2-4.

<sup>123</sup> On the unlikelihood of Ontario balancing its budget while at the same time cutting taxes, see J.S. Dupré, “Taming the Monster: Debt, Budgets, and Federal-Provincial Fiscal Relations at the Fin de Siecle” in Dunn, ed., *supra* note 29, 379 at 394.

<sup>124</sup> Maslove & Moore, *supra* note 29 at 347.

Much of the intellectual fuel for neoliberalism's attack on the fiscal activities of government has been provided by public choice theories of government. The point of departure for public choice theorists is that government officials are motivated not by a detached and selfless desire to serve the larger public interest, but rather seek to maximize their own self-interest in a manner not unlike private market actors.<sup>125</sup> In the public sphere, self-interest is defined variously in terms of material gain, electoral success, bureaucratic empire building, celebrity, or even the moral self-satisfaction of believing one has served the public.<sup>126</sup> In formulating the budget, government actors are thought to respond more to these sorts of informal incentives than to any centrally determined notion of what is in the public interest. On this basis, public choice analysts argue that representative governments suffer from an inherent tendency toward bureaucratic expansion and deficit spending. Politicians respond out of self-interest to the spending demands of their narrow electoral constituencies, it is argued, and because the burden of expenditures is spread widely across the general body of taxpayers, it is seldom cost-efficient to organize any effective opposition. If programs can be financed with borrowed money, the cost of government spending is shifted even further to future taxpayers, who have no voice at all in the current political period. These tendencies are not attributed to a lack of moral fibre on the part of politicians. Rather, "[t]he incentives are such as to generate a regime of fiscal deficits as a necessary consequence of fully rational responses of political agents to the demands of their constituents."<sup>127</sup> Deficits are thus seen as the inevitable by-product of an unrestrained political market place.

Public choice theorists are among the strongest advocates of fiscal limitation laws as a means of remedying this perceived weakness of representative democracies.<sup>128</sup> Neither ordinary politics, nor the disciplining forces of financial markets and credit rating agencies, are thought to be sufficient counterweights to the incentives in the system

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<sup>125</sup> See M. Friedman, "Economists and Economic Policy" (1986) 24 *Econ. Inquiry* 1 at 2. See also J.M. Buchanan & G. Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).

<sup>126</sup> See M.J. Trebilcock, *et al.*, *The Choice of Governing Instrument* (Ottawa: Minister of Supply and Services, 1982) c. 2.

<sup>127</sup> J.M. Buchanan, "Clarifying Confusion About the Balanced Budget Amendment" (1995) 48 *Nat'l Tax J.* 347 at 348-349.

<sup>128</sup> For a helpful review of the public choice argument in favour of fiscal limitation laws, see M.G. Wrobel, *Fiscal Rules for the Control of Government* (Background Paper B-358E) (Ottawa: Library of Parliament Research Branch, 1993).

for excessive public spending. Consequently, it is necessary to “chang[e] institutional arrangements so as to make it in the self-interest of legislators”<sup>129</sup> to constrain their budgets. A legal or constitutional requirement to cap spending or balance the budget ties the hands of government officials and gives them a means of resisting calls for new programs. The object of such formal constraints is to deflect spending pressure away from politicians and to “pit one special interest group against another”<sup>130</sup> by forcing them to compete for a legally limited pool of resources.

In adopting balanced budget laws, Canadian governments have embraced the idea that fiscal policymakers ought to be externally constrained by rules. This legislative trend no doubt draws some of its inspiration from the ideas of public choice theorists and the more general currents of neoliberal thought. Yet, not all of the statutes cohere equally well with the neoliberal image of the state as bloated and inefficient. I want to suggest that the wide differences in the design of balanced budget laws across the country reflect a continuing tension between old and new conceptions of the state. Whereas the Manitoba and Alberta laws display a particularly strong affinity with neoliberalism, Saskatchewan’s adheres at least partially to the welfare liberal ideal of government as the active representative of some collectively determined public interest. This is not to suggest that each statute or provision can be mapped neatly onto one or the other side of a clear ideological divide. Rather, balanced budget laws are an excellent illustration of how old and new orders coexist and are often “subsumed into complex hybrids which contain part of both.”<sup>131</sup> It is useful to revisit these three jurisdictions briefly to demonstrate the point.

There is a remarkably tight fit between certain provisions of the Alberta and Manitoba laws, and public choice prescriptions for reforming government. The strict requirement in both provinces for actual budget balance every year, extended well into the future by debt repayment schedules, together with Manitoba’s special entrenchment provisions, comprise a determined attempt to narrow substantially the institutional parameters of fiscal policy making over the long term. When the tax referenda provisions are factored in, these statutes express a very strong normative preference for an absolute and permanent reduction in the state’s fiscal capacity. They push governments firmly in

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<sup>129</sup> Friedman, *supra* note 125 at 6.

<sup>130</sup> *Ibid.*

<sup>131</sup> Arthurs and Kreklewich, *supra* note 116 at 5.

the direction of withdrawing services and reducing spending, and not just on a temporary basis. The Alberta government has already invoked its balanced budget law to resist pressures to restore social spending, even though it now has a substantial budget surplus. In his 1996 budget speech Finance Minister Jim Dinning said, “And let me speak candidly to those who have their eyes on the surplus. Forget it ... . No one can choose to spend the surplus—it must go to pay down Alberta’s debt. That’s the law in Alberta.”<sup>132</sup> The tax referenda provisions in Manitoba and Alberta resonate strongly with the notion that deficits have in the past been caused by special interests that have extracted government benefits at the expense of a disorganized and silent body of ordinary taxpayers. The threat of a salary penalty for cabinet members in Manitoba bears perhaps the strongest imprint of public choice logic. It adopts wholeheartedly the idea that state actors are motivated primarily by self-interest, and that their decisions can thus be improved by introducing the appropriate market incentives into the governance process.

Public choice ideas and rhetoric have achieved wide influence in both academic and popular thinking about fiscal policy, and are often presented as a form of neutral or at least “non-partisan”<sup>133</sup> analysis. In fact, public choice theory promotes a highly specific set of normative choices for society that depart from liberal democratic understandings of government in which elected representatives are responsible for effecting policies that serve some larger public interest. In a liberal framework, at least in principle, the public good is to have no one fixed definition, but rather is left open to deliberation through interest group politics, voting, and other mechanisms of democracy.<sup>134</sup> Certainly, uncritical accounts of liberal government run the risk of grossly overstating its real life representivity and independence from powerful private interests. But as David Schneiderman has argued, this only suggests a need to enhance public dialogue around economic policies, rather than attempting to entrench one value preference, such as market efficiency, over all others.<sup>135</sup> A strict balanced-budget requirement

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<sup>132</sup> Quoted in R. Kneebone & K. McKenzie, “Alberta’s Deficit Elimination Program: Lessons for Others” (December 1996) *Pol’y Options* 43 at 44.

<sup>133</sup> M. Cote, “Keynote Address: Coping with the Canadian Public Debt Crisis” in *Deficits and Debt: Proceedings of the Colloquium* (Ottawa: Office of the Auditor General of Canada, 1993) 9 at 9 [hereinafter *Deficits and Deb*].

<sup>134</sup> See D. Schneiderman, “Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation” (1995-96) 21 *Queen’s L. J.* 125 at 146-51.

<sup>135</sup> *Ibid.*

attempts to “enclave economic matters, shielding them from broadly-based debate and contestation.”<sup>136</sup>

In striking contrast to Manitoba and Alberta, Saskatchewan’s relatively flexible and proceduralist law bears strong traces of a more traditional liberal vision in which government’s task is to balance competing political and economic interests, and respond to shifting public priorities. By measuring budget balance over a multi-year cycle, and always subject to major unanticipated changes in revenue or expenditure, Saskatchewan (and to a lesser extent New Brunswick and Quebec) has left room for the stimulative and redistributive spending that is the hallmark of the activist, liberal welfare state. Saskatchewan requires each new government to lay out a debt management plan, but does not prescribe the substantive content of such plans or restrict the use of future surpluses, leaving those choices for the elected representatives. The implicit assumption is that the policy process is driven not just by the self-interest of government actors, but also by what Michael Trebilcock describes as “public spirit, or civic virtue, or simply non-self-interested ideas.”<sup>137</sup> The problem with using salary penalties or other such private incentives to guide bureaucratic conduct, Trebilcock points out, is that they presume a prior political agreement on exactly what goals the government should achieve. Unlike the private sector, where profit maximization can be identified unproblematically as the key measure of performance, governments are subject to conflicting mandates and pressures.<sup>138</sup> Whereas the public choice argument, in its extreme form, assumes away that essential political question, Saskatchewan’s approach, at least in principle, preserves space for its discussion.

In a recent paper comparing the deficit cutting strategies of Alberta and Saskatchewan, Neil Thomlinson draws a similar link between fiscal policy choices and prevailing conceptions of the role of government. He points out that Alberta’s Progressive Conservative leadership has “frequently asserted its belief in smaller government,” and has “expressed ... confidence that, without excessive interference, the free market will solve most problems, including social ills such as

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<sup>136</sup> *Ibid.* at 170. Schneiderman makes this comment in the context of analyzing a proposed common market amendment to the Constitution.

<sup>137</sup> Trebilcock, *supra* note 115 at 32. See also D. Farber “Democracy and Disgust: Reflections on Public Choice” (1989) 65 Chi.-Kent L. Rev. 161 at 162-66.

<sup>138</sup> Trebilcock, *supra* note 115 at 62-65.

unemployment.”<sup>139</sup> By contrast, the NDP government in Saskatchewan has moved to eliminate its deficit without abandoning the concept of citizen entitlements. Premier Roy Romanow has explicitly rejected the minimal-government philosophy of Alberta in favour of preserving “communitarian action through our government agencies,”<sup>140</sup> and Thomlinson shows how this has translated into a more egalitarian mix of expenditure cuts and tax increases in Saskatchewan.

Policy differences of this kind can impact profoundly on the distribution of the costs and benefits of fiscal restraint among more and less privileged citizens, and hence they are worth examining and evaluating. At the same time, it would be wrong to suggest that these provinces occupy two extreme ends of a very wide political spectrum. The very fact that Saskatchewan, like Alberta and Manitoba, has enacted a balanced budget law speaks volumes about the common boundaries around current political debate. The rise of fiscal limitation laws across the country is a powerful reminder of Ralph Miliband’s point that “[w]hat is really striking about ... political office holders [in advanced capitalist societies] ... is not their many differences, but the extent of their agreement on fundamental issues.”<sup>141</sup> By its very existence, and regardless of the precise model which is adopted, balanced budget legislation helps to construct deficit and debt reduction as matters of paramount importance to the public interest, which the regular institutions of the political system cannot be trusted to resolve. The careful preservation of policy flexibility in Saskatchewan’s law may be partially illusory when one considers the material and ideological forces pushing a welfare liberal state towards the fiscal agenda of neoliberalism. In the next Part, I argue that the rise of balanced budget legislation in Canada presents dangers of an economic, social and democratic nature, and that these problems are not restricted to the more severe versions in some provinces.

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<sup>139</sup> N.R. Thomlinson, “Same Problems, Different Solutions: Balancing Budgets in Alberta and Saskatchewan” (Paper presented at the Annual General Meeting of the Canadian Political Science Association, Conference of Learned Societies, Brock University, St. Catherines, Ontario, June 1996) at 7 [unpublished; on file with author].

<sup>140</sup> *Ibid.* at 8.

<sup>141</sup> R. Miliband, *The State in Capitalist Society* (London: Quartet Books, 1973) at 64.

#### IV. ECONOMIC, SOCIAL JUSTICE, AND DEMOCRATIC CRITIQUES OF BALANCED BUDGET LAWS

##### A. *Economic Hazards*

There is disagreement among political economists and other commentators about the real causes of deficits, the nature and seriousness of their economic effects, and what fiscal or monetary measures should be taken to reduce them.<sup>142</sup> Changes to monetary policy (interest rates), taxation levels, program spending, and/or strategies to promote employment and investment have all been proposed in various combinations as possible policy responses to the build up of deficits. Those who favour strong measures to eliminate deficits often assert that fiscal control is a matter of economic necessity and indeed will generate economic benefits to compensate for the immediate hardships of restraint. In tabling its balanced budget law, for example, the Manitoba government stressed that “[a] balanced budget is ... essential for sustained economic growth.”<sup>143</sup> This section of the article offers a critical assessment of such claims. I draw attention to compelling arguments that a strict requirement for budget balance is in fact bad economic policy—arguments that have been articulated by commentators spanning the full range of views on the deficit issue. Far from being good fiscal management, a balanced budget mandate is better viewed as a reckless policy that risks damaging the economy at its most vulnerable moments. The current zeal for abolishing deficits reflects a grossly oversimplistic view of the state as merely a burden on the private economy.

A total ban on public sector borrowing is economic nonsense because it ignores the crucial role that government spending plays in stabilizing the economy during private sector recessions. As one group of researchers put it, “[t]he fundamental problem with requiring an annually balanced budget is that the problem of cyclically volatile

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<sup>142</sup> For a sampling of different theories and perspectives see *Deficits and Debt* *supra* note 133; “Politics of Scarcity,” *supra* note 46; P. Dungan & T. Wilson, “Altering the Fiscal-Monetary Policy Mix: Credible Policies to Reduce the Federal Deficit” (1985) *Can. Tax J.* 309; Gillespie, *supra* note 46; L. Osberg & P. Fortin, eds., *Unnecessary Debts* (Toronto: Lorimer, 1996); and Wolfe, *supra* note 46.

<sup>143</sup> *Why Balanced Budget Legislation?* (Winnipeg: Manitoba, Department of Finance, 1995), available on the Internet at [http://www.gov.mb.ca/manitoba/finance/text/bda\\_tx01.html](http://www.gov.mb.ca/manitoba/finance/text/bda_tx01.html).

revenues is not solved.”<sup>144</sup> In periods of low economic activity and high unemployment, governments normally incur so-called cyclical deficits, as tax revenues decline and spending is increased on unemployment insurance, agricultural and other subsidies, social assistance and other programs. In these circumstances, deficit spending performs the helpful function of providing some degree of economic security to persons, as well as stimulating the private economy by supporting levels of demand for goods and services. The existence of cyclical deficits “is entirely as it should be, since it demonstrates the workings of the built-in fiscal stabilizers inherent in our tax and transfer system.”<sup>145</sup>

Both federal and provincial governments play a role in effecting stabilization policy. Traditionally, economists have been skeptical about the wisdom of instituting counter-cyclical stabilizing measures at the provincial level.<sup>146</sup> Certainly the provinces are somewhat less powerful intervenors in this regard, as they lack control over monetary policy and are more vulnerable to capital flight and other forms of leakage of policy impacts across their borders.<sup>147</sup> However, more recent opinion attaches growing importance to the economic effects of provincial fiscal policy, in part due to wider variations in regional economic conditions, and the trend towards devolution of spending responsibilities to the provinces.<sup>148</sup> Certainly, provincial actions can have a significant impact on local and national economic conditions, not least because they inevitably have feedback effects on other governments. The budgetary policy of one provincial government can affect the fiscal capacity and hence the economic management strategies of the federal government, for example, as well as that of the other provinces.<sup>149</sup> The adoption of

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<sup>144</sup> B. Braun, L.E. Johnson & R.D. Ley, “State Revenue Shortfalls: Budget Restraints and Policy Alternatives” (1993) 52 Am. J. Econ. & Soc. 385 at 394.

<sup>145</sup> B. Scarfe, “Economic Fluctuations and Stabilization Policy in Canada: The State of the Art” (1987) 13 Can. Pub. Pol’y 75 at 81. By contrast, the so-called structural deficit is the gap between expenditures and revenues that would exist even if the economy was operating at full employment: see Doern, Maslove & Prince, *supra* note 19 at 20.

<sup>146</sup> See W.E. Oates, “The Theory of Public Finance in a Federal System” (1968) Can. J. Econ. 37.

<sup>147</sup> See Maslove, Prince & Doern, *supra* note 19 at 170-77.

<sup>148</sup> The literature is reviewed in W.M. Scarth, “Provincial Stabilization Policy: Coordination Issues” in *Limits to Government* *supra* note 2, 44.

<sup>149</sup> Dupré, *supra* note 123 at 379. An excellent example, at 394, is Ontario’s recent decision to cut income tax rates, which may in turn affect the size and distribution of federal equalization payments to other provinces. Another is the British Columbia government’s imposition of a three month residency condition on new applicants for social assistance in the province, prompted in part (it asserted) by an influx of welfare recipients from other provinces that were cutting social

balanced budget laws by a majority of the sub-national governments in Canada may also produce cumulative effects that approximate the impact of a federal policy.

A rigid requirement to balance the budget each and every year undermines a government's capacity to perform its stabilization function. Because of the difficulty of anticipating when recessionary pressures will mount and the imperfection of other policy levers available to government, the danger is that a fall off in demand levels would have to be met by immediate spending cuts, "pushing the economy much deeper into recession and seriously postponing the onset of recovery."<sup>150</sup> Besides creating the potential for short term crisis, an absolute prohibition on borrowing may also prove inefficient over the longer term. Bradley Braun, L.E. Johnson, and Robert Ley found that state governments forced to achieve annual balance did so most often by reducing service levels, usually via crude across the board expenditure cuts.<sup>151</sup> They point out that the resulting uneven flow of services is inconsistent with the maximization of economic welfare over time, and that sudden fiscal policy changes make for a less stable business climate.<sup>152</sup> Moreover, this approach may undermine future prosperity as the condition of infrastructure declines. Though these economists support the view that government deficits and spending should be reduced, they argue that annual balance requirements are too rigid, in that their opportunity costs may outweigh their benefits in any particular case.

These sorts of concerns prompted several dozen American economists to issue an open letter opposing passage of a balanced budget amendment to the United States Constitution. Though spanning a range of views on economic policy, all agreed that "requiring balanced budgets in each fiscal year regardless of prevailing economic circumstances is bad public policy."<sup>153</sup> Significantly, even James Buchanan, a public choice economist and one of the most vociferous

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assistance rates. In response, the federal government withheld an amount of social program funding from British Columbia (the residency requirement has now been repealed).

<sup>150</sup> C.L. Schultze, "The Balanced Budget Amendment: Needed? Effective? Efficient?" (1995) 48 Nat'l Tax J. 317 at 325. See also, for example, R. Greenstein, (1997) 76 Cong. Dig. 91; A.M. Rivlin, (1995) 74 Cong. Dig. 47; R. Rubin, (1997) 76 Cong. Dig. 75; R.J. Saulnier, "Do We Need a Balanced-Budget Amendment to the Constitution?" (1988) 18 Presidential Stud. Q. 157 at 158; and Wildavsky, *supra* note 51 at 12-13.

<sup>151</sup> Braun, Johnson & Ley, *supra* note 144 at 388.

<sup>152</sup> *Ibid.* at 392-95.

<sup>153</sup> "Economists Oppose Balanced Budget Amendment to the U.S. Constitution" (May-June 1992) 35 Challenge 59 at 59.

academic proponents of balanced budget laws, has conceded there is a risk of aggravating recessionary trends if deficits are prohibited under all circumstances.<sup>154</sup> In response to this concern, Buchanan recommends that only the budget *plan*, prepared using fair estimates of revenues and expenditures, should be subject to annual balancing. The law, in his view, should not prohibit actual deficits arising from unforeseen changes in economic conditions after the budget is approved.<sup>155</sup> Other commentators have proposed addressing the destabilization concern by requiring governments only to balance a so-called high employment budget.<sup>156</sup> Under this system, revenues and expenditures would be estimated based on low unemployment assumptions, and deficits attributable to higher unemployment levels would be permissible. Another possible safeguard, favoured by Braun, Johnson, and Ley, is to relax anti-deficit rules by requiring balance only over a longer multi-year period, or to set a period within which government must repay any recessionary borrowings once the economy begins to recover.<sup>157</sup> It is useful to revisit the design of Canadian balanced budget laws in light of the economic hazards and possible solutions identified by these American economists.

Significantly, Canadian legislators have directed governments not just to plan for a balanced budget (Buchanan's proposal, and the practice of most American states)<sup>158</sup> but to show that actual balance has been achieved at year end. This feature alone makes the Canadian laws comparatively rigid and inflexible. Some jurisdictions have done more than others, however, to address the danger of economic destabilization. Provinces like Saskatchewan and New Brunswick that measure fiscal balance over a multi-year period have certainly built in a degree of flexibility to respond to economic downturns. Notably, however, their four-year fiscal periods coincide more closely with electoral cycles than with the variable cycles of the economy. Should recession commence toward the end of an electoral mandate, either government could find itself under pressure to restrain spending in order to report a balanced budget for the period, potentially worsening the private economy when it most needs bolstering. Saskatchewan might sidestep this problem by

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<sup>154</sup> *Supra* note 127 at 352-353.

<sup>155</sup> *Ibid.*

<sup>156</sup> See Schultze, *supra* note 150 at 325-326; and C.J. Whalen, "The Case Against a Balanced-Budget Amendment" (Spring 1995) 25 Soc. Pol'y 45 at 47.

<sup>157</sup> *Supra* note 144 at 395.

<sup>158</sup> NASBO, *supra* note 77.

appealing to its “major unanticipated event” clause, or New Brunswick may remind voters that its law only sets out an “objective,” but in either case the need to get around the balanced budget law would place the government on the political defensive. Thus, even the two provinces that have done the most to retain fiscal flexibility may find that their new laws create political disincentives to engage in stabilization spending.

The problem is more worrisome still in the other provinces and in the Northwest Territories. The extreme cases, of course, are Alberta and Manitoba. Alberta’s sole concession to economic variability is its use of conservative forecasting assumptions to estimate resource dependent revenues. It requires actual budget balance every year, and has no relieving provisions to permit deficit spending in recessions. Manitoba also requires strict annual balance, relaxing this rule only when revenues drop by at least 5 per cent. There is no accommodation for less dramatic revenue fluctuations, or for sudden increases in expenditure, nor does the exception for “natural or other disasters” lend itself easily to addressing problems of economic stability. During the severe recession of the early 1990s, for example, Ontario government revenues dropped by 4.5 per cent in a single year, while social assistance expenditures across all provinces increased by 16.5 per cent.<sup>159</sup> Changes of this magnitude would not be sufficient to trigger the contingency clause in Manitoba’s balanced budget law.

Added to the political disincentives for backing down on fiscal targets in a recession are the personal financial disincentives facing Manitoba cabinet ministers, who stand to suffer salary penalties if they engage in deficit spending. Moreover, the tax referendum laws in both Alberta and Manitoba will very likely bias any necessary fiscal adjustments heavily in favour of spending cuts. It is disturbing to note that even public choice economist Buchanan advises against combining a zero deficit rule with a tax limitation clause. Though governments should be forced to present a realistic balanced budget plan each year, Buchanan argues, he accepts that *how* the deficit is to be eliminated is a political question that should be left to elected governments.<sup>160</sup>

It is cause for concern that Manitoba and Alberta have gone well beyond the outer limits of balanced budget restrictions proposed by even the most conservative American economists. Manitoba may answer that it has created a Fiscal Stabilization Fund precisely to address the need for higher recessionary spending. Alberta has been urged to create a

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<sup>159</sup> Maslove & Moore, *supra* note 29 at 340-341.

<sup>160</sup> *Supra* note 127 at 351.

similar contingency fund for this purpose.<sup>161</sup> However, this strategy too has limitations. The stabilization fund first must be accumulated out of budget surpluses over a period of years, and must be large enough to cushion the government against a recession that lasts more than one year. A recent report by a major credit rating agency stressed that Manitoba will have to build up a larger stabilization fund if it is to avoid running deficits in the next economic downturn.<sup>162</sup> American commentators have also identified a serious political weakness of reserve funds. If allowed to grow as large as necessary to perform their function, they can attract public resentment about tax levels remaining static while services decline. Negative public reaction to the build up of large surplus funds has been cited as one of the factors that triggered the California property tax revolt of the late 1970s.<sup>163</sup> Thus Braun, Johnson, and Ley have concluded that “contingency funds may supplement, but do not replace traditional budget balancing strategies.”<sup>164</sup>

The foregoing discussion suggests that the new balanced budget laws are to varying degrees ill-conceived and poorly designed, even when evaluated in terms of their economic effect, which is often assumed to be their most advantageous feature. In the next section of the article, I argue that such legislation is also deeply problematic when viewed from the perspective of social justice.

### *B. Social (In)Justice and the Drive for Balanced Budgets*

The previous section presented evidence that balanced budget laws are unlikely to deliver the economic benefits often claimed for them, and in fact may well promote inefficient and destabilizing patterns of public spending. I now shift the focus to analyze their social justice implications. I begin by considering the negative impact of existing neoliberal restructuring policies on less privileged members of society, particularly the ways in which social spending cuts have reinforced inequalities rooted in class, gender, race and other relations of power.

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<sup>161</sup> B. Laghi, "Set Up New Rainy-Day Fund in Alberta, Experts Urge" *The [Toronto] Globe and Mail* (14 September 1996) A4.

<sup>162</sup> Moody's Investors Service, *Canadian Credit Report: Province of Manitoba* (New York: 17 June 1996) at 1.

<sup>163</sup> See, for example, W.H. Oakland, "Proposition 13: Genesis and Consequences" in G.G. Kaufman & K.T. Rosen, eds., *The Property Tax Revolt: The Case of Proposition 13* (Cambridge: Ballinger, 1981) 31 at 40-43.

<sup>164</sup> *Supra* note 144 at 392.

The deficit scare has played a crucial role in legitimating the abdication of governmental responsibility for social injustice. I argue that the current movement to legislate anti-deficit and anti-tax measures threatens to entrench this regressive approach to social policy more deeply and irretrievably. I discuss the possible instrumental effects of the new laws on short term budgetary decisions, as well as their wider significance in shaping public discourse, and conclude that balanced budget laws will only increase the difficulty of articulating and implementing a social justice agenda.

Efforts to roll back the welfare state are best seen as one aspect of a larger political and economic movement to liberalize private markets and reduce the costs of capitalist production. Thus, restructuring has entailed significant cost-cutting and employment reductions in the private sector as well as in government. On the public side, which is the focus of this paper, aggressive efforts to reduce budgetary deficits have too often been pursued at the expense of programs designed to enhance social justice. In crafting their deficit and debt reduction policies in the 1990s, governments have relied far more heavily on expenditure cuts than on tax increases.<sup>165</sup> Indeed, many politicians have boasted of their commitment to eliminate deficits by cutting spending, and have rejected the option of raising more tax revenue from individuals and corporations with substantial ability to pay.<sup>166</sup> In its 1997 budget, for instance, the federal government observed proudly that “[e]xpenditure reductions have been the overwhelming

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<sup>165</sup> Total spending for all levels of government has been reduced from a high of 51.6 per cent of Gross Domestic Product (GDP) in 1992, to 47.6 per cent in 1995. Total tax revenues have also declined over the same period, from a peak of 36.7 per cent of GDP down to 35.9 per cent in 1995: D.B. Perry, “Fiscal Figures: Changes in Government Spending Patterns” (1996) 44 Can. Tax J. 578 at 581 and 585. Perry concludes, at 579, that “[g]iven the small change in the relative importance of revenues, the improvement in the deficit picture is testimony to the effectiveness of expenditure restraint at all levels of government.” Not all provinces have weighted their anti-deficit strategies as heavily in favour of spending cuts; some have used a more balanced mix of cuts and revenue increases: Maslove & Moore, *supra* note 29 at 347.

<sup>166</sup> For a budget proposal that would use progressive taxation more heavily to help eliminate the deficit while restoring social program expenditures to earlier levels, see *Alternative Federal Budget Papers 1997: A Million Jobs, Economic Security, A Budget for the Future* (Ottawa: Canadian Centre for Policy Alternatives, 1997) at 3-40. See also H. Mackenzie, “Renewing the Fiscal Capacity of the State” in D. Drache & A. Ranachan, eds., *Warm Heart, Cold Country: Fiscal and Social Policy Reform in Canada* (Ottawa: Caledon Institute of Social Policy/Robarts Centre for Canadian Studies, York University, 1995) 151; and D. Ross, “Curbing Debt: Finding a Balance Between Taxes and Expenditures”: *ibid.*, 293.

source of deficit reduction.”<sup>167</sup> These expenditure cuts have fallen very heavily on social programs, meaning health, education, income security programs and social services. For example, social spending in Alberta dropped to the lowest level in the country in the 1990s while the government continued to subsidize private business more generously than any other province.<sup>168</sup> Within the social envelope, welfare and other social services that tend to benefit the most impoverished and disadvantaged groups have been targetted especially harshly by some provinces. In Ontario, for example, the Progressive Conservative government reduced social assistance rates by over 21 per cent in its first year of office, imposing about one-quarter of its planned spending reductions for the year exclusively on welfare recipients.<sup>169</sup>

It is important to note that the decline of provincial social services has been directly facilitated by the federal government’s abolition of the Canada Assistance Plan (CAP), the former vehicle for federal-provincial cost sharing of social programming, and the creation of a new block fund, the Canada Health and Social Transfer (CHST).<sup>170</sup> Besides dramatically reducing total federal funding for health, education and welfare, the CHST has removed most of the national standards governing provincial welfare delivery, including the requirements that provinces provide welfare to all citizens in need, and take into account the basic requirements of living in setting welfare rates.<sup>171</sup> The CHST also gives the provinces full discretion over funding levels for other social services, such as legal aid for family and other non-criminal matters, day care, assistance for homeless people, sexual assault counselling, women’s

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<sup>167</sup> *Budget 97*, *supra* note 1 at 9. Indeed, the budget claims, at 11, that 91 per cent of the reduction in the deficit is due to expenditure cuts. While this figure fails to give adequate credit to other factors such as interest savings and higher economic growth, it does indicate the government’s emphasis on spending cuts relative to tax increases.

<sup>168</sup> See K. Taft, *Shredding the Public Interest: Ralph Klein and 25 Years of One-Party Government* (Edmonton: University of Alberta Press, 1997) especially c. 5 and 7. Federal social spending reportedly fell from 12.3 per cent of GDP in 1983-84 to 10.7 per cent in 1990-91: I. Bakker & K. Scott, “From the Postwar to the Post-Liberal Keynesian Welfare State” in W. Clement, ed., *Understanding Canada: Building on the New Canadian Political Economy* (Montreal: McGill-Queen’s University Press, 1997) 286 at 302.

<sup>169</sup> See *Masse v. Ontario (Community and Social Services)* (1996), 134 D.L.R. (4th) 20 at 24, 44, and 58 (Div Ct.) (an unsuccessful challenge to welfare reduction under the *Charter*).

<sup>170</sup> See A.M. Maslove, “The Canada Health and Social Transfer: Forcing Issues” in G. Swimmer, ed., *How Ottawa Spends 1996-97: Life Under the Knife* (Ottawa: Carleton University Press, 1996) 283 [hereinafter “Forcing Issues”]; and K. Battle & S. Torjman, “How Finance Reformed Social Policy” in Drache & Ranachan, eds., *supra* note 166, 407.

<sup>171</sup> See M. Jackman, “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1996) 8 C.J.W.L. 372.

shelters, or services for disabled people. Whereas federal transfers under the CAP were withdrawn if a province ceased to fund a particular social program, the CHST gives provinces virtually complete freedom to cut or cancel social services, with no financial penalty. As the total pool of federal resources shrinks, even well-intentioned provincial governments will be tempted to starve social services in order to shore up the health and education systems, the latter being more broad-based and popular with middle class voters.

Social programs have borne an enormous share of the costs of fiscal restraint, especially in light of the fact that they contributed very little if anything to the build up of the public debt since the late 1970s. The notion that excessive social spending was somehow responsible for the deterioration of Canada's fiscal condition has now been thoroughly discredited. Looking back on the last two decades, numerous analysts have concluded that an extraordinarily high interest rate policy, combined with the lower employment and economic growth that high interest rates helped to engender, are overwhelmingly responsible for the dramatic rise in the debt burden.<sup>172</sup> Nor are social spending cuts primarily responsible for the recent success of some governments in shrinking or even eliminating their deficits. Rather, the explanation lies in the increased revenues they are enjoying in a period of stronger economic growth, helped along by lower interest rates.<sup>173</sup> It is interesting to note that the same economic factors were responsible for diminishing the massive levels of public debt accumulated during the war years.<sup>174</sup> These facts cast grave doubt on whether the degree of social spending cuts made in recent years was ever warranted or needed to balance government budgets.

Necessary or not, social program cuts have been made, and are taking an especially heavy toll on less privileged members of society: groups that have limited access to labour market income, rely more heavily on social services, and are over-represented among the income

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<sup>172</sup> See "Politics of Scarcity" *supra* note 46; Dungan & Wilson, *supra* note 142; and Gillespie, *supra* note 46. See also P. Fortin, "The Canadian Fiscal Problem: The Macroeconomic Connection" in Osberg & Fortin, eds., *supra* note 142; R.D. Kneebone, "Deficits and Debt in Canada: Some Lessons from Recent History" (1994) 22 Can. Pub. Pol. 152; J. Stanford, "Growth, Interest and Debt: Canada's Fall from the Fiscal Knife-Edge" in *Alternative Federal Budget Papers 1997*, *supra* note 166, 275; and Mackenzie, *supra* note 166. Several of these analysts also identify the failure to maintain an adequate tax base as a contributing factor. On the fiscal consequences of eroding the tax base through special exemptions and other concessions, see Wolfe, *supra* note 46.

<sup>173</sup> See G. Gibson, "The Snake Oil in the Federal Budget" *The [Toronto] Globe and Mail* (4 March 1997) A17. In Alberta, booming natural resource revenues helped to produce the surplus.

<sup>174</sup> See Dupré, *supra* note 123 at 380.

and wealth poor of the nation. Women, racialized people, the elderly poor, and people with disabilities, will thus tend to suffer disproportionately (though not exclusively) from the hardships of fiscal restraint. There is a growing literature concerning the gendered impact of restructuring policies.<sup>175</sup> Besides being heavy users of social programs, women are employed in large numbers in the public sector and hence will bear much of the brunt of job losses and declining working conditions in government departments and institutions. But perhaps most important is the increased burden being shifted onto women as caregivers, consequent upon the withdrawal of state funded social services. The contraction of public health care, education, child care and other services is only possible because families, meaning primarily women, expand their caregiving labour to compensate. Neoliberal policies rely implicitly on women to act as “shock absorbers,”<sup>176</sup> cushioning the impact of cutbacks by increasing their household labour to ensure that basic human needs are met.<sup>177</sup> Because women’s domestic labour remains invisible and un(der)compensated, many of the costs of restructuring can be buried by simply adding them to women’s workday.

The impact of restructuring on particular women is clearly dependant on their social location in terms of class, race, sexual identity, age and other factors. Those women (and men) who are relatively well situated in the labour market, for example, will increasingly replace public day care and other services by hiring private domestic workers, often immigrant women of colour, who typically receive low wages and benefits and lack many of the legal and social protections enjoyed by those in the more formal workforce.<sup>178</sup> Low-income women, with or without access to a male wage, will be particularly squeezed by the contraction of social programs. Neoliberalism suffers from a profound contradiction in that it simultaneously requires women to intensify their social reproductive labour and to earn more market income. Declining labour market conditions for men and women alike, combined with the reduction of cash transfers and supports from government, mean that

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<sup>175</sup> See I. Bakker, ed., *The Strategic Silence: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) [hereinafter *Strategic Silence*]; and *Politics on the Margins* *supra* note 114.

<sup>176</sup> *Politics on the Margins* *supra* note 114 at 19.

<sup>177</sup> See also P. Armstrong, “Unravelling the Safety Net: Transformations in Health Care and Their Impact on Women” in *Women and Policy*, *supra* note 114, 129 especially at 136-140.

<sup>178</sup> See A.B. Bakan & D.K. Strasiulus, “Structural Adjustment, Citizenship, and Foreign Domestic Labour: The Canadian Case” in *Rethinking Restructuring* *supra* note 117, 217.

women have fewer choices about engaging in paid labour.<sup>179</sup> Perhaps best exemplifying this tightening bind is the situation of single mothers, who are subject all at once to decreased child care subsidies and welfare transfers, more onerous conditions and surveillance around social assistance, and exhortations to become more independent by seeking paid work in a high-unemployment labour market.<sup>180</sup>

Even accepting, for the purposes of argument, that balancing the budget is a matter of utmost urgency, it is plain that the means chosen by Canadian governments to advance that goal entail a variety of deleterious consequences for social justice and equality. The changes wrought by restructuring are far more heterogenous than this brief survey can capture, and their precise implications will vary among provinces, municipalities, institutions and individuals. The broad pattern, however, is disturbingly clear: governments are offloading responsibility for basic human welfare onto insecure labour markets and overstressed families.

What, if anything, do balanced budget laws add to this scenario of rising social disparity? They are sometimes viewed as mere reflections of a larger political unwillingness to grapple with social justice concerns, not very different from the unlegislated deficit reduction schedules announced periodically by finance ministers. I argue here, however, that the enactment of fiscal limitation laws is an important new departure from *de facto* fiscal restraint, and one that needs to be resisted on its own terms from a social justice perspective. Certainly, it would be wrong to suggest that balanced budget legislation is the primary causal force behind social spending cuts, such that its repeal would necessarily result in a more egalitarian fiscal policy. It is worth remembering, for instance, that the withdrawal of federal social spending in recent years has gone well beyond the requirements of the old *Spending Control Act*<sup>181</sup> and is now being implemented without the help of any balanced budget law at the federal level. However, the entrenchment of neoliberal fiscal agendas in legislative form potentially raises new barriers to equality-seeking initiatives. My concerns are at two levels: the instrumental effects that balanced budget laws may have

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<sup>179</sup> See P. Armstrong, "The Feminization of the Labour Force" in *Rethinking Restructuring* *supra* note 117, 29; and J. Fudge, "Fragmentation and Feminization: The Challenge of Equity for Labour-Relations Policy" in *Women and Policy*, *supra* note 114, 57.

<sup>180</sup> See P. Evans, "Single Mothers and Ontario's Welfare Policy: Restructuring the Debate" in *Women and Policy*, *supra* note 114, 151.

<sup>181</sup> *Supra* note 7.

on specific budgetary decisions; and their discursive significance in the production of public agendas hostile to social spending.

First, provincial balanced budget legislation can be expected to generate increased pressure for regressive spending cuts whenever revenues decline, as they will when the economy again goes into recession. These laws have been enacted at a time of relative economic strength, and designed to last indefinitely into the future. The next economic downturn may trigger a new round of harsh cuts if governments are to comply with their laws, particularly since the federal government has capped its transfers under the CHST and will no longer automatically share half the cost of a higher social assistance bill. If nothing else, the presence of balanced budget legislation increases the political costs of spending money to alleviate poverty and other dire effects of recession on people. These concerns were voiced by opposition members of the legislative assembly in Manitoba in the following terms:

What is going to happen in years down the road when the pressure is really on this government, when the [reductions in] federal transfer payments do start to kick in and bite ... . What is going to happen with health care when the choice of this government and particularly this cabinet is between funding health care or getting their own salaries reduced by 20 or 40 per cent?<sup>182</sup>

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I think we could see the ministers actually punishing the poor and cutting programs in order to keep their budget in line just so they would not lose their salaries ... . To save face and to save salary, they would reduce whatever they had to within that budget.<sup>183</sup>

While it is possible to increase taxes to finance rising welfare and social service costs, political hostility to taxation in the neoliberal era will make this the less favoured option. Indeed, governments are under concerted pressure from some lobby groups to cut taxes, which would further undermine the state's fiscal capacity in the future. Of course, instead of cutting expenditures or raising taxes a government could choose simply to run a deficit in violation of its balanced budget law. Governments have long been accountable for borrowing decisions through the political system, and through the operation of financial markets. Under a balanced budget law, however, this borrowing could now be challenged in the courts.

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<sup>182</sup> Manitoba, Legislative Assembly, *Debates and Proceedings* 1st Sess., 36th Leg., vol. XLV, No. 42 (4 October 1995) at 3649, S. Struthers.

<sup>183</sup> *Ibid.* at 3652, R. Wowchuk.

In those provinces with tax limitation laws (currently Alberta, Manitoba, and British Columbia), the barriers to generating new tax revenue have been raised even higher relative to the political costs of cutting expenditures. When the choice lies between holding a referendum on higher taxes or simply reducing budgetary spending at the cabinet table, for example, it seems likely that governments will do almost anything to avoid the former. It is possible, of course, to raise new revenues without changing tax rates, and another probable effect of tax limitation laws will be to increase the use of less visible and more regressive revenue instruments. The example of Massachusetts is instructive. Following the adoption of a property tax limitation law, researchers found that local governments began raising more revenue outside the tax system *per se*, through measures such as licence and permit fees, utility charges, higher fees for school lunches and athletics, and service charges for parks, recreational facilities, trash collection, ambulance and other health services.<sup>184</sup> Moreover, these levies were often introduced hastily without any careful review of their distributive consequences.<sup>185</sup> Charges such as these tend to have a regressive incidence, especially if they impose the same flat dollar fee on every user, without regard to ability to pay or any relief for low-income persons. To the extent they target basic human services, such fees raise very serious social justice concerns, potentially deterring low-income people from using the health care system, for example.<sup>186</sup> Recent studies show that some Canadian governments have begun to tap user fees more heavily as a revenue source.<sup>187</sup> Freezing taxes legislatively, or requiring referendum approval for higher tax rates, is likely only to increase the attraction of non-tax forms of revenue. The result may be

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<sup>184</sup> L. Susskind & C. Horan, "Understanding How and Why the Most Drastic Cuts Were Avoided" in L. Susskind & J.F. Serio, eds., *Proposition 21/2: Its Impact on Massachusetts* (Cambridge: Oelgeschlager, Gunn & Hain, 1983) 263 at 275-278; and P.L. McCarney, "Increasing Reliance on User Fees and Charges": *ibid.*, 351.

<sup>185</sup> McCarney, *supra* note 184 at 355.

<sup>186</sup> See R.M. Bird & T. Tsiopoulos, "User Charges for Public Services: Potentials and Problems" (1997) 45 Can. Tax J. 25 at 75. The authors argue that user charges can be an effective means of achieving efficiencies in the delivery of public services, and that distributional problems can be addressed through careful design of the user charges themselves, or through the provision of cash transfers. However, they concede that many of the user charges in place today are not well designed to meet these objectives.

<sup>187</sup> Maslove & Moore, *supra* note 29 at 344. Figures gathered by Bird & Tsiopoulos, *supra* note 186 at 66, indicate only a slight increase in total user charges across all governments since 1984-85, with the largest increase at the provincial level.

simply to shift more of the burden of financing government services onto those who have the least ability to pay.<sup>188</sup>

Fiscal limitation laws also threaten to exacerbate inequality of access to the budget process. Cuts may be needed swiftly in mid-budget cycle as actual expenditure and revenue levels become known, diminishing the scope for public input as to how priorities should be adjusted to ensure budget targets are met. Again, the evidence from Massachusetts shows that when local governments engaged in crisis cutting to meet their fiscal targets, the decision-making process became more closed and autocratic. The voice of poor constituencies was diminished even further, creating concern that “efficiency measures will be imposed on unpopular groups and weak programs rather than on truly wasteful programs.”<sup>189</sup> Though their precise impact is yet to be seen in Canada, fiscal limits are likely to alter budgetary practices in ways that “will make it more difficult, in the long run, to support a vital and effective public sector,”<sup>190</sup> which in turn will limit our governments’ capacity to ensure a universal and decent level of access to basic goods and services.

Balanced budget laws will operate not just as coercive instruments pushing governments toward certain fiscal policies and away from others, but will also function discursively to help produce ideologically specific understandings of social justice and its attainability. That is, aside from any instrumental effects they may have, these laws will tend to strengthen the already powerful role of restructuring discourse in shaping the prevailing social vision. The term “restructuring discourse” has been coined by Janine Brodie and others to describe the overarching narrative within which the massive structural changes of the neoliberal era are rendered possible, and their unequal effects constructed as normal.<sup>191</sup> To understand restructuring as a discursive phenomenon is to reject the notion that these changes are simply brought to us by external economic forces, and to recognize that their momentum is supported in large part by “a set of impositional claims”<sup>192</sup> about the ideal form of social order. Restructuring discourse asserts a new common sense about the proper boundaries between the public

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<sup>188</sup> Thomlinson, *supra* note 139 at 8.

<sup>189</sup> Susskind & Horan, *supra* note 184 at 279.

<sup>190</sup> N. Brooks, “The Changing Structure of the Canadian Tax System: Accommodating the Rich” (1993) 31 *Osgoode Hall L.J.* 137 at 154-155.

<sup>191</sup> See *Politics on the Margins* *supra* note 114.

<sup>192</sup> *Ibid.* at 27.

realms of the state and politics, and the private realms of market and family, as well as redefining the subjects who participate in these spheres. This revised “political imaginary,”<sup>193</sup> to borrow Fraser’s term, is “often distilled in catchphrases and stereotypical images which dominate public discourse.”<sup>194</sup> The frequent and positive repetition of terms such as “balanced budget” and “fiscal responsibility” qualifies them as important catchphrases in the new Canadian political imaginary. Indeed, Thom Workman characterizes the deficit scare as the central lynchpin responsible for effecting a profound loss of public confidence in the viability of a welfare state.<sup>195</sup> He argues that “the widespread support for neoliberal policies, even among elements of the dispossessed classes, is owing to the ease with which the discourse of fiscal crisis has affixed itself to Canadian political life.”<sup>196</sup>

Isabella Bakker has noted that restructuring discourse tends to emphasize certain macro-indicators of governmental performance, such as how much it has reduced the deficit or the number of public sector employees, and presents these achievements as advancing a common good.<sup>197</sup> Yet this image of economic progress rests on certain assumptions about the actors who comprise the economy. The individual citizen who underwrites this discursive economy is thought to be relatively autonomous and able to participate in markets, mobile between economic sectors and regions, and free to access a limitless supply of social reproductive services in the family when they are withdrawn by the state. These premises suffer from a “conceptual silence”<sup>198</sup> concerning the ways in which market relations are not neutral but are structured by social factors such as the gendered division of reproductive labour. The assumption within restructuring discourse that all citizens have access to market income ignores the conditions of class, race, gender and other forms of inequality “that determine when, how, and which people can exercise ‘individual’ responsibility ...”<sup>199</sup>

The valorization of personal responsibility and independence from government is a central feature of the political imaginary of

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<sup>193</sup> “Clintonism,” *supra* note 113 at 9.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Banking on Deception: The Discourse of Fiscal Crisis* (Halifax: Fernwood, 1996).

<sup>196</sup> *Ibid.* at 13.

<sup>197</sup> “Engendering Macro-Economic Policy Reform in the Era of Global Restructuring and Adjustment” in *Strategic Silence* *supra* note 175, 1.

<sup>198</sup> *Ibid.* at 1.

<sup>199</sup> Kline, *supra* note 120 at 559.

restructuring.<sup>200</sup> The construction of social needs as individual, apolitical, and private facilitates the state's denial of responsibility for inequality, as well as occluding the gender and race based exploitation through which these so-called private needs are met. Expanding the boundaries of family responsibility for social reproduction naturalizes the movement of large amounts of caregiving labour from paid public sector workers to (mostly) women family members and domestic workers. The conceptual distinction between productive and reproductive labour is essentially an arbitrary one that relates more to where the work is done and whether it is paid, rather than any difference in economic value.<sup>201</sup> As Fraser has put it, the real free riders in this system are not those who lack employment and need government support, but all those who free ride on unpaid or underpaid domestic labour to maximize their own market opportunities.<sup>202</sup> The individualization of social disadvantage leads to a definition of problems and solutions that stress private, familial responsibility, obscuring systemic causes and letting the state off the hook.

Those concerned with the social impacts of neoliberal restructuring need to continue challenging its discursive forms, at the same time as they protest concrete policy changes or program cuts. Balanced budget laws should be resisted because they help to reproduce the dominant ideological discourse of restructuring, whether or not they can be causally linked to a single specific program cut. Indeed they represent a more potent form of discourse than non-legal promises or projections of deficit reduction. Legalizing the image of the balanced budget as the ultimate test of governmental competence imbues it with additional discursive power, simply because of the status of law as a voice of rationality and truth in our culture. In Carol Smart's words, "law exercises power not simply in its material effects ... but also in its ability to disqualify other knowledges and experiences."<sup>203</sup> Treasury officials in New Zealand clearly appreciated this discursive power when they campaigned for a fiscal limitation law in the early 1990s. Though the New Zealand *Fiscal Responsibility Act* enacted in 1994 largely

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<sup>200</sup> See N. Fraser & L. Gordon, "A Genealogy of *Dependency* Tracing a Keyword of the U.S. Welfare State" (1994) 19.2 *Signs* 309.

<sup>201</sup> See M. Eichler, *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) at 17-19.

<sup>202</sup> See N. Fraser, "Gender Equity and the Welfare State: A Postindustrial Thought Experiment" in S. Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, N.J.: Princeton University Press, 1996) 218 at 235.

<sup>203</sup> See C. Smart, *Feminism and the Power of the Law* (London: Routledge, 1989) at 11.

codified existing policies and accounting practices, government officials took the view that “[f]ixing them in legislation would raise their symbolic importance ... [and] increase the constituency for fiscal discipline.”<sup>204</sup> Such laws may be repealable, but that is not the point. The strengthening of the ideological hold of restructuring discourse through law makes it less likely that future governments will summon the political will to repeal it.

The specific requirements of balanced budget laws, to greater or lesser degrees in different jurisdictions, tend to shore up the assumptions and images of restructuring discourse, particularly those of the impotent and circumscribed state. Certainly, they reinforce the extreme priority attached to deficit and debt reduction, but more profoundly, they speak of government in terms of constraint and lack of choice. The state is now to be deprived of agency by law, as well as by allegedly uncontrollable global economic forces. It is not only politically but also juridically “hollow[ed] out.”<sup>205</sup> As well, the debate over fiscal policy is reframed in terms of whether the government has obeyed the law, and away from the political question of whether it has made good choices in difficult times. They thus threaten to close off whatever space remains to debate what fiscal and social goals government should be striving for, allowing politicians to sidestep responsibility for choices that harm the least privileged members of society. This final point raises issues of democracy that are the focus of the next section.

### C. *The False Democracy of Fiscal Limits*

One of the claims advanced in favour of balanced budget laws, in addition to their alleged economic benefits, is that they will enhance the financial transparency and accountability of government. Provisions requiring regular public disclosure of fiscal data, prescribing conservative economic forecasting assumptions, and prohibiting last minute accounting changes, all speak to this theme of accountability.<sup>206</sup> It is reflected even more strikingly in the tax referenda laws of Manitoba and Alberta, and in Manitoba’s requirement for special public hearings on any bill to amend or repeal its balanced budget law. The threat of financial penalties for cabinet ministers in Manitoba, and the possibility

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<sup>204</sup> J. Kelsey, *Economic Fundamentalism* (London: Pluto Press, 1995) at 233.

<sup>205</sup> *Politics on the Margin* *supra* note 114 at 54.

<sup>206</sup> The accountability-related provisions discussed in this paragraph were detailed in Part II(B)(6), above.

of dismissal in the Northwest Territories, also play to this desire to hold government officials more accountable for their fiscal decisions. All of these provisions hold out the promise of greater honesty and democratic responsibility in the formation of budgets. I argue in this section, however, that the democratic promise of balanced budget laws is a false one. While addressing some legitimate, albeit narrow concerns about specific accounting practices, these statutes lay no groundwork for any serious democratization of fiscal policy. Quite to the contrary, their overwhelming thrust is to discourage public debate about how much emphasis should be placed on deficit reduction over other goals, who bears the cost of fiscal restraint, or what means the government should use to achieve balanced budgets. Fiscal limitation laws ultimately misrepresent the problems of democracy in a neoliberal era by constructing governments as the primary source of irresponsible power in society, distracting attention from the need to render markets and private accumulations of economic power more amenable to regulation in the interests of citizens.

There is no question that the fiscal policy process is in need of democratization. The closed nature of the budget process, and its virtual capture by a small community of tax experts, has already been noted. Nor are these problems limited to the fiscal sphere. Commentators from across the political spectrum have observed that public dissatisfaction with the limited avenues for participating in Westminster-style parliamentary institutions have helped to fuel anti-government sentiments. The recent surge of right-wing populism in Canada can be attributed in part to its effective expression of this discontent.<sup>207</sup> But social critics on the left have also castigated the lack of meaningful opportunities to deliberate political choices.<sup>208</sup> Theorizing these issues from an American perspective, Iris Marion Young has argued that political participation in welfare states has largely been watered down to a competition among interest groups for shares of a limited pool of welfare benefits. Interest group pluralism is but a pale image of democracy, she asserts, because it limits debate to the distributive question of who should receive the publically controlled surplus

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<sup>207</sup> For example, the 1997 election platform of the federal Reform Party promised abundant use of referenda, popular assemblies, citizen initiatives, recall laws, and free legislative votes: *Fresh Start*, *supra* note 2 at 23. See also P. Boyer, *Direct Democracy in Canada* (Toronto and Oxford: Dundurn Press, 1992).

<sup>208</sup> See, for example, G. Albo, "Democratic Citizenship and the Future of Public Management" in G. Albo, D. Langille & L. Panitch, eds., *A Different Kind of State? Popular Power and Democratic Administration* (Toronto: Oxford University Press, 1993) 17; and L. Panitch, "A Different Kind of State?": *ibid.*, 2.

generated by capitalism. Politics is thus constructed as a competitive process in which resources are predefined, increasingly scarce, and accorded to the most effective lobbyists. This is both alienating to many citizens, because it seems to collapse claims of justice or right into claims of self-interest, and depoliticizing, because it seldom challenges the underlying institutional arrangements and cultural images that are responsible for distributive inequalities in the first place.<sup>209</sup> As well, the dominance of elite expertism over bureaucratic administration discourages citizen participation, because “most people are convinced that [the] issues ... are too complex to be understood except by fiscal, legal and managerial experts.”<sup>210</sup> All of these factors have contributed to a legitimate backlash against the lack of scope for self-determination.

Given this litany of valid complaints, one hesitates to criticize any attempt to ensure greater openness in government. However, many of the accountability claims made for balanced budget laws are exaggerated or illusory. Not only are they likely to fall short of their self-proclaimed democratic objectives, but in fact they serve to narrow, rather than widen, public debate about fiscal policy. Far from enriching understanding or discussion of major economic policy issues facing the nation, balanced budget legislation is better viewed as an exercise in manufacturing consent to a prevailing fiscal agenda that generates distinctly unequal costs and benefits.

Fiscal limits focus attention exclusively on the budgetary bottom line, and on the question of how quickly it should reach specified numerical targets. As such, they shift to the sidelines the substantive political question of whether fiscal balance is the right goal under all conditions, and what other objectives might reasonably displace it. While they do call for disclosure of more information, it is all information that speaks, once again, to the bottom line. Disclosure requirements make certain types of facts important and de-emphasize others, such as the government’s record in reducing rates of unemployment or poverty, or redressing inequalities of income and wealth. In this way, fiscal limitation laws communicate a great deal about what is a priority of government. Once in place, they neatly excuse governments from justifying why deficit and debt reduction should continue to be their overriding objective. Citizen protests over program cuts can be deflected with the simple assertion that “the law

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<sup>209</sup> I.M. Young, *Justice and the Politics of Difference* (New Jersey: Princeton University Press, 1990) at 80.

<sup>210</sup> *Ibid.* See also L. Philipps, “Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy” (1996) 11 *Can. J. Law & Soc.* 141.

made us do it.” The adoption of balanced budget laws is a fine example of how governments in the neoliberal age often assert power precisely by disclaiming it. As Wendy Brown observes:

the late modern state ... represents itself as pervasively hamstrung, quasi-impotent, unable to come through on many of its commitments, because it is decentralizing ..., because ‘it is no longer the solution to social problems,’ because it is ‘but one player on a global chessboard ...’<sup>211</sup>

Balanced budget laws provide another means for policy makers to deny responsibility for the fiscal hardships that flow from their affirmative political choices.

Further, balanced budget laws are anti-democratic because they encourage social policy decisions to be effected through the budget, a forum that minimizes opportunities for consultation, compromise, or protest. It is exceedingly easy to pass a zero deficit requirement in the abstract, without specifying how the target is to be achieved.<sup>212</sup> The real choices about what spending will be cut (or what new revenues will be raised) must then be fought out in the annual budget process. This is problematic in light of the relative insulation of finance ministers and their staffs from interest groups other than the business sector, and because of the difficulty of winning changes to the budget once it has been tabled. As deficit reduction has become the central preoccupation of governments, finance officials have acquired growing influence over social policy reform.<sup>213</sup> Justice and social services ministers increasingly profess to have no power over major policy decisions related to their own portfolios. The abolition of the CAP and the wholesale restructuring of federal social transfers under the CHST, for example, was developed by the Department of Finance with little input from Human Resources Development or other social ministries.<sup>214</sup> First announced publicly by Paul Martin in his 1995 budget speech, the CHST not surprisingly “displayed more evidence of federal expenditure control than of social program considerations.”<sup>215</sup> The need to comply with balanced budget laws and to report frequently on fiscal progress is likely to reinforce the dominance of finance officials over spending decisions.

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<sup>211</sup> *States of Injury: Power and Freedom in Late Modernity* (Princeton, N.J.: Princeton University Press, 1995) at 194.

<sup>212</sup> Schultze, *supra* note 150 at 320-321.

<sup>213</sup> Battle & Torjman, *supra* note 170 at 418-420.

<sup>214</sup> “Forcing Issues,” *supra* note 170 at 284.

<sup>215</sup> *Ibid.*

The types of accountability mechanisms favoured by fiscal limitation laws rest upon a particular conception of the political subject as articulated within restructuring discourse. The citizen who inhabits this discourse is constructed as an individual unallied with any so-called special interest, and as a self-reliant actor who believes in markets, personal responsibility, and the value of a circumscribed state. For this mythical individual, “measurable performance indicators become the ultimate test of democratic accountability, whilst citizenship is effectively reconstructed as a consumer status.”<sup>216</sup> Efficiency, then, becomes an end in itself and the only legitimate criterion for evaluating public services.

It is vital to consider who is left out of this new concept of citizenship. There are a host of ways in which the marketization of the state works not to enhance political participation, but to reinscribe and worsen the exclusions already familiar under welfare state liberalism. Many of the institutions of state and civil society that historically have facilitated the expression of minority or dissenting views are now being dismantled, defunded or privatized. Harry Arthurs points out, for example, that neoliberal governments have a propensity to work out the fine details of government downsizing—which programs and services will be lost—through executive orders and managerial directives, rather than more open processes such as legislation.<sup>217</sup> As well, bureaucratic efficiency measures are reducing opportunities for direct contact between administrators and welfare state clients in favour of more routinized and impersonal modes of service delivery, while at the same time less legal aid and other advocacy funding is available to assist individuals in claiming their entitlements.<sup>218</sup> And private service providers operating under contract to governments are often less responsive to users, particularly to low income clients who have little economic power to assert against for-profit enterprises.<sup>219</sup>

Democracy is not merely a function of how the central organs of the state operate, but also requires the organized participation of citizens. In this regard, balanced budget laws promise only to exacerbate the impoverishment of community political organizations under restructuring. Isolated individuals generally can play only a limited role

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<sup>216</sup> N. Lacey, “Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991” (1994) 57 Mod. L. Rev. 534.

<sup>217</sup> See Arthurs, *supra* note 115 at 50-51.

<sup>218</sup> *Ibid.* at 47-50.

<sup>219</sup> Albo, *supra* note 208 at 25.

in political life, especially if they lack the material and cultural resources to acquire information and make their voices heard. Public interest groups, lobby organizations, independent think tanks, social action groups, service agencies, and other intermediaries are critical facilitators of deliberation and protest. However the non-governmental sector has been significantly defunded in the name of deficit reduction, thus neutralizing some of the most vocal watchdogs and critics of government.<sup>220</sup> A declining share of the remaining public funding is delivered in the form of general operating grants. Instead, public interest groups must chase a limited number of one-time research grants, which do not assist in maintaining ongoing watching briefs or lobbying efforts on the issues these groups have identified as most important to them. As a consequence, the non-governmental scene is increasingly dominated by those groups who can attract large private donations. With the erosion of basic income security programs once seen as an essential precondition for equal participation in the political sphere, the energies of more radical groups are often channelled into defending minimum welfare standards.<sup>221</sup> Without adequate organizational resources and representation, no amount of fiscal disclosure will enable marginalized groups to hold government accountable to their interests.

The adoption of tax referenda laws by Alberta and Manitoba is an especially beguiling appeal to the notion of more accountable government. While direct democracy mechanisms have the potential to enhance citizen participation, in the context of neoliberal restructuring, they are more likely only to confirm and legitimate the views of more powerful groups. It is highly significant that only tax increases, and not expenditure cuts, are subject to popular approval. The strategy of severing the link between taxation levels and the quality of public services has proven very effective in securing consent (or the appearance of consent) to the contraction of social spending.<sup>222</sup> The concern is that middle class and affluent citizens will vote down tax increases and that instead of cutting services to these groups, governments will impose the costs of maintaining a balanced budget on less privileged communities who rely on state support to meet basic needs. This assumes, of course, that referenda will actually be held. The more likely prospect is that

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<sup>220</sup> See A. Cardozo, "Lion Taming: Downsizing the Opponents of Downsizing" in Swimmer, ed., *supra* note 170, 303.

<sup>221</sup> Panitch, *supra* note 208 at 5-6; and I.M. Young, *supra* note 209 at 90.

<sup>222</sup> Mackenzie, *supra* note 166 at 157-58. See also Brooks, *supra* note 190 at 158-59.

governments will simply cut spending on their own initiative in order to avoid taking a tax increase to the electorate.

In the event that referenda do occur, there is little evidence that governments will take steps to provide marginalized groups with the support they need to participate equally in the formulation of tax proposals or in pre-referenda media campaigns or deliberative fora. In addition to lacking the material resources to organize, these groups can be effectively excluded from mainstream discourse by less tangible constraints, such as the cultural devaluation of certain styles of expression, or the tendency of more privileged speakers to interrupt or reinterpret remarks.<sup>223</sup> In the current political environment, governments are more likely to exacerbate than to counteract these inequalities. The Alberta government, for example, has made a habit of denigrating its critics as special interests that do not represent the views of normal Albertans, and announcing cutbacks at such a rapid pace that not even the media can provide informed analysis.<sup>224</sup> Under conditions of rising social disparity and decreasing acceptance of organized political dissent, the introduction of direct democracy reforms will tend to empower those whose voices already dominate, and to create a false image of consensus around their views.

The most profound failing of balanced budget accountability provisions, however, is that they falsely construct governments as the major source of irresponsible power in our society, thus distracting attention from the arbitrary private power exercised in markets. Fiscal limitation laws do nothing to democratize private economic relations, but worse than this, they attempt to constrain the very institutions of state that have in the past provided our only significant check on untrammelled market forces. They internalize the demands of transnational capital, and thereby diminish governments' capacity to regulate economic power in the interests of its citizens.<sup>225</sup> While balanced budget laws may appear superficially to advance democratic values, in substance they are far more likely to diminish the space for public discussion of substantive political choices.

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<sup>223</sup> See N. Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York and London: Routledge, 1997) 69 at 77-80; Kline, *supra* note 120; and I.M. Young, "Communication and the Other: Beyond Deliberative Democracy" in Benhabib, ed., *supra* note 202, 120.

<sup>224</sup> Thomlinson, *supra* note 139 at 18 and 21.

<sup>225</sup> D. Schneiderman makes this argument in relation to free trade agreements, in "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 U.T.L.J. 499 at 536.

## V. CONCLUSION

In analyzing the sudden rise of balanced budget laws in Canada, this article has highlighted significant jurisdictional differences across the country, as well as exposing a great deal of common ground, both legally and politically. Certain provinces, most notably Saskatchewan and New Brunswick, have taken pains to avoid some of the most inefficient and socially unjust aspects of the worst models, which I identify as Alberta's and Manitoba's. They have done so by calling for budget balance over a multi-year cycle (rather than annually) and making generous allowance for deficit spending if economic or other conditions change. As well, they avoid debt reduction schedules that mortgage future surpluses and preclude the restoration of public spending for many years, and reject tax limitations and enforcement penalties that hinder the capacity of elected governments to make political judgments about the most appropriate fiscal policy. These features mitigate some of the dangers that the most severe balanced budget laws pose to economic stability, social justice and democracy. However, given the neoliberal context within which governments currently operate, I suggest there can be no such thing as a really good fiscal limitation law. While the most extreme forms are very ill-advised and should be repealed immediately, this is not to advocate enactment of the kinder, gentler versions either.

Perhaps at some future juncture, when budgets are no longer viewed above all as something to be balanced, but rather as a means of financing an effective public sector, it may be useful to debate the normative goals that should animate fiscal policy decisions, and even to express those goals in legislative or constitutional form. In the present reality, however, fiscal limits are likely to be formulated, interpreted, and applied in ways that are economically foolish and socially regressive. The rare government with some political will to resist the neoliberal agenda will find that even a moderate fiscal limitation works to strengthen the ideological premises of restructuring discourse, making the retention of public services more difficult to defend. By constructing government as prone to extravagance and inefficiency, and therefore in need of external discipline and constraint, balanced budget laws affirm the prevailing valorization of market forces as the best mechanism for ordering social and economic affairs. In so doing, they inhibit attempts to address the really serious problems of rising insecurity and inequality, and the unaccountability of private accumulations of wealth to the needs and interests of less privileged citizens. In short, while there are better

and worse balanced budget laws in Canada, we would be best off without any at all.